IN THE

Supreme Court of the United States.

OCTOBER TERM, 1921.

No.

JAMES EUGENE BURTON, JAMES LOWELL COOK, JOHN HENRY KEINER, JR., JOHN WILLIAM KELLY, WILLIAM HENRY MOONEY, CHARLES LE ROY WAGNER AND WILLIAM LESLIE WALSH,

Appellants,

vs.

CHARLES F. CLYNE, UNITED STATES DISTRICT ATTORNEY FOR THE NORTHERN DISTRICT OF ILLINOIS.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

INDEX.

JAMES EUGENE BURTON, ET AL.

vs.

CHARLES F. CLYNE, DISTRICT ATTORNEY, ETC.

Pleas in the District Court of the United States for the Northern District of Illinois, Eastern Division, begun and held at the United States Court Room, in the City of Chicago, in said District and Division, before the Honorable Kenesaw M. Landis, District Judge of the United States for the Northern District of Illinois, Honorable Louis Fitz Henry, District Judge for the Southern District of Illinois, holding U. S. District Court for the Northern District of Illinois, by assignment, and Honorable Evan A. Evans, Circuit Judge of the Seventh Judicial Circuit holding U. S. District Court for the Northern District of Illinois, by assignment, sitting en Banc, on Thursday, the 29th day of December, in the year of our Lord one thousand nine hundred and 21, being one of the days of the regular December Term of said Court, begun Monday, the 19th day of December, and of our Independence the 146th year.

Present:

Honorable Kenesaw M. Landis, District Judge,
Hon. Evan A. Evans, Circuit Judge, and
Louis Fitz Henry, District Judge, sitting en Banc.
John J. Bradley, U. S. Marshal.
John H. R. Jamar, Clerk.

IN THE DISTRICT COURT OF THE UNITED STATES

Northern District of Illinois

Eastern Division

James Eugene Burton, James Lowell Cook, John Henry Keiner, Jr., John William Kelly, William Henry Mooney, Charles LeRoy Wagner, and William Leslie Walsh,
Plaintiffs,
vs.
Charles F. Clyne, U. S. District Attorney for the Northern District of Illinois,
Defendant.
} No. 2499

Be it remembered that heretofore, to-wit: on the 28th day of November, 1921, came the above named complainants, by their solicitors, and filed their bill of complaint, as follows:

IN THE DISTRICT COURT OF THE UNITED STATES

Northern District of Illinois,

Eastern Division.

James Eugene Burton, James Lowell Cook, John Henry Keiner, Jr., John William Kelly, William Henry Mooney, Charles LeRoy Wagner and William Leslie Walsh,
vs.
Charles F. Clyne, United States District Attorney for the Northern District of Illinois.
} In Equity.

BILL IN EQUITY.

MAYER, MEYER, AUSTRIAN & PLATT,
Solicitors for Plaintiffs.

LEVY MAYER,
Of Counsel.

IN THE DISTRICT COURT OF THE UNITED STATES

Northern District of Illinois,

Eastern Division.

James Eugene Burton, James Lowell Cook, John Henry Keiner, Jr., John William Kelly, William Henry Mooney, Charles LeRoy Wagner and William Leslie Walsh,
vs.
Charles F. Clyne, United States District Attorney for the Northern District of Illinois.
} In Equity.

BILL IN EQUITY.

To the Honorable Judges of the District Court of the United States, for the Northern District of Illinois, Eastern Division:

The plaintiffs, James Eugene Burton, James Lowell Cook, John Henry Keiner, Jr., John William Kelly, William Henry Mooney, Charles LeRoy Wagner and William Leslie Walsh, bring this their bill of complaint in their own behalf and in behalf of all other members of Traders' Live Stock Exchange of Chicago and all the other yard traders or dealers who do business at the stockyards in Chicago, Illinois, of The Union Stock Yard and Transit Company of Chicago, who by order of said court may be given leave to join in this bill of complaint, or to intervene herein, against Charles F. Clyne as United States District Attorney for the Northern District of Illinois, and state as follows, to wit:

(1) That each of said plaintiffs is now and for many years continuously last past has been a citizen of the State of Illinois and a resident of said City of Chicago; that said defendant now is and for more than five years continuously last past has been the duly appointed, qualified and acting United States District Attorney for the Northern District of Illinois;

(2) That this is a suit of a civil nature in equity, and as to each of the plaintiffs involves more than the sum of three thousand dollars ($3,000) exclusive of interest and costs.

(3) That this suit arises under the Constitution and laws of the United States, and particularly under:

(a) Article I, Section 8, Clause 3 of the Constitution of the United States;

(b) The Fourth Amendment of the Constitution;

(c) The Fifth Amendment of the Constitution;

(d) The Eighth Amendment of the Constitution;

(e) The Tenth Amendment of the Constitution;

(f) An Act of Congress approved August 15, 1921, entitled

"An Act to Regulate Interstate and Foreign Commerce in Live Stock, Live Stock Products, Dairy Products, Poultry, Poultry Products and Eggs, and for other purposes."
and which act is hereinafter called Stock Yards Act.

(4) That The Union Stock Yards and Transit Company of Chicago (hereinafter called Stock Yards Company) was incorporated by special act of the Legislature of Illinois on February 13, 1865; that the Stock Yards Company was authorized by its charter to acquire, locate, construct and maintain in said City of Chicago the necessary yards, enclosures, buildings, structures and railway lines, tracks, switches and turnouts, aqueducts for the reception, safe-keeping, feeding and watering and for the weighing, delivery and transfer of cattle and live stock of every description and for the accommodation of the business of a general union stockyard for cattle and live stock, including the erection and establishment of hotel buildings and the right to use the same. That shortly after its incorporation the Stock Yards Company purchased and acquired the property necessary and proper to carry out the purposes of its charter and located and constructed, and for many years has maintained, and now owns, maintains and operates in said City of Chicago a general union stockyard and during all of said time has also owned, maintained and operated and now owns, maintains and operates at said union stockyards, a public live stock market and all of the appurtenances and facilities necessary and proper to carry on the purpose for which the Stock Yards Company was incorporated, including, among such purposes, the receiving, safekeeping, feeding, bedding, watering, weighing, delivery and transfer of live stock of all descriptions. That during all of said time the Stock Yards Company has maintained and operated and now maintains and operates at said stockyards pens

for the purpose of enclosing, holding and caring for all of the live stock received at said stockyards. That the area of said stockyards now used by the Stock Yards Company for its stockyards purposes is over four hundred (400) acres; that the Stock Yards Company has maintained and operated for many years and now maintains and operates at the said stockyards over three hundred (300) miles of railroad tracks consisting of main lines connecting with the trunk lines entering said City of Chicago, and a large number of switches to the various packing houses and industries established at said stockyards or adjacent thereto. That the said stockyards of the Stock Yards Company is the largest in the world, and during the year 1920 received and handled 15,423,872 head of live stock of all descriptions, including therein cattle, calves, hogs, sheep and horses, all having a market value of $665,421,232. That during the year 1921 the Stock Yards Company has and will have received and handled approximately as many head of live stock as it received and handled during the year 1920 and that said live stock will be of an estimated value of, to wit, over $500,000,000. That said stockyards are a public market and that vast numbers of live stock received at said stockyards by the Stock Yards Company are shipped to said stockyards from various states outside the State of Illinois by live stock growers, feeders and others, as well as from points within the State of Illinois.

5. That substantially all the live stock shipped to and received at the said stockyards is shipped on consignment and consigned to commission merchants doing business at said stockyards who sell and dispose of said live stock exclusively for a commission or brokerage, and none of said commission merchants buys or sells live stock for his own account or business. That all of the live stock shipped to and received by said commission merchants is by them sold and disposed of at said stockyards. That all of said live stock is sold by said commission merchants to purchasers who buy the same for slaughter at packing houses located at said stockyards or adjacent thereto, or to purchasers who buy the same for shipment to and slaughter at packing houses located at points outside the State of Illinois, or to purchasers who buy live stock for purposes of feeding and fattening the same, or to these plaintiffs and other yard traders or dealers. That during 1920 the amount of live stock so sold at said stockyards by said commission merchants to these plaintiffs and to the other members of said Traders' Exchange, amounted

to about one-third (1/3) of all of the live stock receipts at said stockyards during said year, and totaled a value of $221,807,000; and during the year 1921 such sales by said commission merchants to the plaintiffs and to the other members of said Traders' Exchange will amount approximately to about one-third of all of the live-stock receipts at said stockyards during 1921 and will be of the approximate value of $150,000,000.

(6) The manner of shipping, handling, buying and selling nearly all of the live stock shipped to and received at said stockyards is as follows: Said live stock is shipped to said stockyards principally from points in states outside of said State of Illinois, although a part thereof is shipped from points in the State of Illinois: Said live stock is loaded at the points of origin in what are known as live stock cars, built for the express purpose of holding and carrying live stock. Said live stock is shipped under a live-stock shipping contract issued by the rail carriers, corresponding in legal effect to what is known as a straight bill of lading; that the rail carriers of live stock do not issue an order bill of lading for the transportation of live stock, and that all (as hereinbefore averred) of said live stock is shipped on consignment expressly and directly to said commission merchants doing business at said stockyards. That said live stock, promptly upon its arrival at said stockyards, is unloaded by the Stock Yards Company from said live-stock cars onto chutes in said stockyards and then and there by the Stock Yards Company delivered to the commission merchants to whom said live stock is consigned. That said live stock is then at once driven from said chutes by the commission merchants to the pens in said stockyards that have been assigned by said stockyards to the commission merchants for their use; that said live stock which is then in the exclusive possession, custody and control of the commission merchants, is watered and fed by the Stock Yards Company, at the request of the commission merchants, and at the cost of the consignors of said live stock. That contemporaneously with the delivery of said live stock to the commission merchants, the carriage and transportation thereof are forthwith ended and the transportation and transit thereof are completely terminated; that the commission merchants do not, as hereinbefore stated, themselves purchase any part of said live stock and they do not transport the same or any part thereof. The commission merchants have no part in, or control whatsoever, over the disposition

of any of said live stock sold by them. That all purchases of the live stock consigned to the commission merchants at said stockyards are made by packers for purposes of slaughter at packing houses located at said stockyards, or adjacent thereto, or by agents or representatives of outside packing houses located at points beyond the State of Illinois, or by these plaintiffs and other yard traders and dealers doing business at said stockyards, or by country buyers who purchase for feeding purposes.

(7) That not until after the delivery of said live stock to the commission merchants and not until after the carriage and transportation of said live stock have completely terminated and ceased, does the business of these plaintiffs or the other yard traders or dealers at said stockyards begin.

(8) That for respective period varying from five to thirty-five years, continuously last past, each of the plaintiffs has been, and now is engaged exclusively as a yard trader or dealer at said stockyards, and during all of said time the plaintiffs respectively were and now are engaged exclusively in buying in the open market at said stockyards from said commission merchants and from each other, the live stock so purchased by them respectively and in selling the same at said stockyards. That these plaintiffs and other yard traders and dealers at said stockyards are engaged in business exclusively on their own account and for their own benefit. That they never have and do not now buy on commission or sell on commission, but they buy and sell exclusively for their own benefit, and all gain or loss made in all such transactions belongs to or is sustained by the plaintiffs respectively or said other yard traders or dealers. That the plaintiffs respectively have done and are now doing at said stockyards a very large annual business, that of one of them approximating $4,000,000 per year, and that of none of them being less than $175,000 per year, and that each of them is in receipt from his said business, of net profits exceeding annually the sum of $4,000.

(9) That by far the greater part of all of the live stock consigned to and received by the commission merchants at said stockyards, is shipped and delivered to them in carload or trainload lots and a substantial part of said live stock is not graded or conditioned to meet the specific wants or requirements of the packer buyer or the other buyers at said stockyards. That therefore a very large part of all of such

live-stock receipts by the commission merchants is sold by them to the plaintiffs and the other yard traders or dealers at said stockyards who in turn separate, segregate, grade and classify said mixed live stock and grade and mix the same with like grades contained in other purchases which the plaintiffs and the other yard traders or dealers make at said stockyards, thus enabling the plaintiffs and the other yard traders and dealers at said stockyards to grade and classify said live stock to meet the wants and requirements of particular buyers. That the plaintiffs and the other yard traders or dealers at said stockyards buy in the open market at said stockyards in open competition with each other and with other yard traders and dealers and with packer purchasers and other purchasers, and that all purchases made by these plaintiffs and other yard traders or dealers at said stockyards are made for the sole purpose of reselling the same at said market at said stockyards, to yard traders, dealers and other purchasers at said stockyards. That all the said live stock consigned to and received by the commission merchants is by them sold and disposed of as promptly as possible and rarely held by them for more than a few days and then only to enable them to make a more satisfactory sale of the live stock. That all the live stock purchased by the plaintiffs or other yard traders or dealers at said stockyards is purchased by them only from the commission merchants or other yard traders or dealers and immediately after such purchase, is delivered by the sellers to them at said stockyards and placed in pens assigned by the Stock Yards Company for the use of the plaintiffs or other yard traders or dealers at said stockyards. That immediately upon the purchase of the live stock at said stockyards by the plaintiffs or other yard traders or dealers at said stockyards, the live stock so purchased is weighed out to the plaintiffs and the other yard traders or dealers at said stockyards upon the scales of the Stock Yards Company and paid for by the purchasers to the sellers in accordance with the scale weights. That in the purchase and sale of all or any of said live stock by the plaintiffs or other yard traders or dealers at said stockyards there is no transportation or carriage of any kind whatsoever involved, but the transportation and transit of said live stock, as hereinbefore stated, has already long prior thereto completely terminated and ceased and is not again initiated by these plaintiffs or other yard traders or dealers at said stockyards. That the live stock purchased by the plaintiffs and

the other yard traders or dealers at said stockyards is sold by them as promptly as possible to other traders or dealers at said stockyards or to buyers for local consumption or to buyers who buy for feeding purposes, and only a small per cent of such live stock is sold to what are known as order buyers,—that is, buyers at said stockyards who buy on orders received by them from persons located either in or outside the State of Illinois. That there is no continuity of movement in interstate commerce of said live stock through said stockyards but that such continuity of movement has completely ceased and terminated when said live stock has been delivered to the commission merchants by the rail carriers and Stock Yards Company as aforesaid. That there is no continuous transportation and no transportation whatsoever of any of the said live stock purchased or sold by the plaintiffs between any point within the State of Illinois and any point without said state, nor between any two points within the State of Illinois, but, as hereinbefore stated, the transportation or carriage of said live stock has theretofore completely terminated and ceased.

(10) That all of the live stock purchased by these plaintiffs and the other yard traders or dealers at said stockyards is immediately after such purchase, delivered, as aforesaid, into their possession and custody, and immediately after such purchase and delivery to them, is paid for by them to the sellers thereof. That the title vests immediately in the plaintiffs or the other yard traders or dealers at said stockyards after such purchase by them of said live stock. That frequently the live stock so purchased by these plaintiffs or the other yard traders or dealers at said stockyards, remains in their exclusive possession or custody for several days, awaiting the opportunity which the plaintiffs and the other yard traders or dealers seek, of obtaining, if possible, a more advantageous opportunity for the sale of said live stock; and during all of that time said live stock is fed and watered by the Stock Yards Company at the exclusive expense of the plaintiffs or the other yard traders or dealers. That as to purchases of live stock made from the plaintiffs or other yard traders or dealers at said stockyards by purchasers who ship such purchases outside the State of Illinois, the plaintiffs or other yard traders or dealers have nothing to do with the shipments or transportation of such purchases. The title to and delivery of all such purchases passes and is made at said

stockyards to such purchasers immediately after the plaintiffs or other yard traders or dealers have sold the said live stock to the purchasers last aforesaid. Nor do the plaintiffs or other yard traders or dealers at such yards, act as consignors or consignees of any of the live stock received or sold at said stockyards.

(11) That there is in existence at said stockyards and has been since March 26, 1907, when it was incorporated (the same having been incorporated not for pecuniary profit, under the laws of the State of Illinois), a corporation known as Traders' Live Stock Exchange, hereinafter called Traders' Exchange and of which Exchange these plaintiffs are now and for many years last past have been members in good standing. That said Traders' Exchange was incorporated for the express purpose of promoting and protecting all interests connected with the buying and selling of live stock at the said stockyards, and of cultivating courteous and manly conduct among said traders or dealers, and for the purpose of giving dignity and responsibility to yard traders or dealers. That there are now and have been for some time last past at least 528 members in good standing of said Traders' Exchange, all of whom are yard traders or dealers in live stock at said stockyards, either as principals or employees.

(12) That there are about two thousand (2,000) yard traders or dealers engaged in the same kind of business as are these plaintiffs, at said stockyards and at other similar public stockyards located at various points such as Kansas City, East St. Louis, Indianapolis, Sioux City, Omaha, St. Joseph, Louisville, Oklahoma City, and elsewhere in the United States. That nearly all of said yard traders or dealers are members of different Traders' Live Stock Exchanges organized, and existing at said various stockyard points and that these Traders' Exchanges are in turn members of what is known as National Traders' Live Stock Exchange, a voluntary unincorporated association made up and composed of the various Traders' Live Stock Exchanges that are organized at said various stockyards. That the total business of all of said yard traders or dealers exceeds (as these plaintiffs are informed and believe and aver the fact to be) one billion dollars annually. This suit is instituted not only for the benefit of these plaintiffs and of other yard traders or dealers doing business at said Chicago stockyards, but also for the benefit of all of the said National Traders' Live Stock Ex-

changes and their various members, so that there can be promptly obtained a final decree adjudicating the questions at issue in this case.

(13) That said Traders' Exchange has been a great benefit to the live stock market at said Chicago stockyards, and also in raising the standard of business integrity among such yard traders or dealers. That the plaintiffs and other yard traders or dealers are, as hereinbefore averred, competitors in the purchase and sale of live stock at said stockyards, with each other and with all other live stock buyers at said stockyards, and that the effect of said business of these plaintiffs and of the yard traders and dealers at said stockyards has been that of largely increasing the number of live stock sent to and marketed at said stockyards, because of the fact that said yard traders or dealers greatly increase the number of those who buy and sell live stock at said market.

(14) That none of these plaintiffs for many years last past has been or now is engaged in doing an interstate business at said stockyards, or elsewhere. That the business of these plaintiffs is exclusively intrastate and is not interstate business or commerce of any kind.

(15) That the Secretary of Agriculture, the Honorable Henry C. Wallace, claims and insists that the Stock Yards Act applies to and governs these plaintiffs and the other yard traders and dealers at said stockyards. But on the contrary these plaintiffs and the other yard traders and dealers at said stockyards insist that their business is exclusively intrastate and that they are not subject to the Stock Yards Act nor to the regulation and control of the Secretary of Agriculture thereunder.

(16) That the Secretary of Agriculture has declared said stockyards to be a stockyard subject to the Stock Yards Act, and that said Chicago stockyards has an area normally available for handling live stock, exclusive of runs, alleys or passageways, of more than 20,000 square feet. That on or about November 1, 1921, the Secretary of Agriculture declared and gave public notice that said stockyards is within the definition of the Stock Yards Act, and posted copies of such notice in said stockyards and that under the provisions of the Stock Yards Act these plaintiffs and no other dealer at such stockyards is permitted to carry on his business as a dealer at such stockyards unless he is registered with the Secretary of

Agriculture under such rules and regulations as the Secretary prescribes. That the Secretary has prescribed general rules and regulations for carrying out the provisions of the Stock Yards Act with respect to the plaintiffs. That the Stock Yards Act provides that whoever violates the provisions of Section 303 thereof, or whoever violates the rules and regulations prescribed by the Secretary with reference to such registration, shall be liable to a penalty of not more than $500 for each such offense, and not more than $25 for each day such offense continues, which shall accrue to the United States and may be recovered by a civil action brought by the United States; that the aggregate of such fines if imposed upon the members of said Traders' Exchange would exceed two hundred and sixty-four thousand dollars ($264,000) for the first day, and if imposed upon all the members of said National Traders' Exchange would exceed seven hundred and fifty thousand dollars ($750,000) for the first day. The Stock Yards Act further provides that every dealer shall keep such accounts, records and memoranda as fully and accurately disclose all transactions involved in his business, and under the rules and regulations promulgated by the Secretary of Agriculture every registered dealer is required to make to the Secretary of Agriculture, reports giving such information concerning the business of the dealer as the Secretary may require, and each registered dealer is required during ordinary business hours to permit any representative of the Secretary of Agriculture to enter his place of business and inspect any and all property in his possession or control and all records pertaining to his business. So also no registered dealer is permitted to destroy or dispose of any of his books, records, documents or papers which contain or explain or modify the accounts of his business without the written consent of the Secretary, and by another one of said rules and regulations it is provided that a stockyards owner or registrant shall not knowingly transact any business in commerce involving live stock in, or in connection with, stockyards, with any dealer who is not registered.

(17) By the Stock Yards Act it is further provided that if any dealer fails to keep such accounts, records and memoranda, or whenever the Secretary finds that the accounts, records and memoranda of such dealer do not fully and correctly disclose all transactions involved in his business, the Secretary may prescribe the manner and form in which such ac

counts, records and memoranda should be kept, and that thereafter any dealer who fails to keep such accounts, records and memoranda in the manner and form approved by the Secretary, shall, upon conviction be fined up to $5,000 or imprisoned not more than three years, or both.

(18) The Stock Yards Act further provides that, in construing and enforcing the provisions of said act, the act, omission or failure of any employee, agent or officer acting for or employed by any dealer, within the scope of his employment or office, shall in every case be also taken to be the act, omission or failure of such dealer as well as of such agent, officer or other person.

(19) That by the law of the United States, it is the duty of every district attorney to prosecute in his district all delinquents for crimes and offenses cognizable under the authority of the United States, and all civil actions in which the United States is concerned. That by the Stock Yards Act it is also provided that it shall be the duty of the various district attorneys under the direction of the Attorney General, to prosecute for the recovery of forfeitures. That the said Charles F. Clyne, district attorney as aforesaid, is not only charged by law with the duty of enforcing the Stock Yards Act, but, as these plaintiffs are informed and believe and state the fact to be, threatens to at once enforce all the terms and provisions of the Stock Yards Act as against these plaintiffs respectively.

(20) The plaintiffs further allege that, unless restrained by this Honorable Court, the said defendant intends to and will enforce against these plaintiffs and each of them and their respective officers, agents, servants and employees, the various pains, penalties and forfeitures provided for in the Stock Yards Act, and intends to and will commence and prosecute the various prosecutions, proceedings and suits in the Stock Yards Act purported to be authorized or required, and that such action on the part of such defendant will necessarily and unavoidably involve the plaintiffs and their respective officers, agents, servants and employees in a multiplicity of legal proceedings and involve and threaten them with the waste and dissipation of their staff of skilled and trained employees, or coerce them into quitting the employ of the plaintiffs in order to avoid prosecution and punishment and their imprisonment under color of legal proceed-

ings, and will foreclose and prohibit the transaction of the business of these plaintiffs, the seizure of their property, books and records, the loss of their customers and the destruction of their good will and property, all to the irreparable damage of the respective plaintiffs, and that all and singular the damages resulting from such acts and proceedings would be incapable of admeasurement and adjudication at law. The plaintiffs are informed and believe and upon such information allege, on information and belief, that the defendant is not possessed of sufficient means to satisfy a judgment against him for the very large and substantial damages which would accrue to the plaintiffs respectively if this Honorable Court does not restrain and enjoin the defendant as hereinafter prayed.

(21) These plaintiffs are severally advised by their counsel, and based upon such advice, aver:

(a) That each and all of the provisions of the Stock Yards Act, in so far as such provisions pertain to these plaintiffs severally, are unconstitutional and void. That the provisions to which these plaintiffs more particularly refer are Subdivision (b) of paragraph 6 of Section 2 of the Stock Yards Act, Subdivision (d) of Section 301 of said act, Section 303 of said act, Subdivision (a) of Section 308 of said act, Subdivisions (a) and (b) of Section 312 of said act, Subdivisions (a) and (b) of Section 314 of said act, and Sections 315, 401 and 403 of said act, and each and all of the said rules and regulations promulgated by the Secretary of Agriculture. That for purposes of convenience, a copy of said act and said rules and regulations are herewith brought into court and filed herewith.

(b) That the Stock Yards Act and said rules and regulations are unconstitutional and void for the following reasons:

They violate Article 1, Section 8, Clause 3 of the Constitution of the United States and the Fourth, Fifth, Eighth and Tenth Amendments to the Constitution in that

(a) They attempt to regulate commerce which is not commerce with foreign nations and is not commerce among the several states and is not commerce with the Indian tribes, but is commerce that is wholly and exclusively intrastate, that is carried on by these plaintiffs in the purchase or sale of live stock.

(b) They violate the right of the plaintiffs to be secure

in their persons, houses, papers and effects against unreasonable searches and seizures;

(c) They deprive these plaintiffs severally of life, liberty or property without due process of law, and in effect, take private property for public use without just compensation; and

(d) Impose excessive fines and inflict cruel and unusual punishments;

Wherefore, the plaintiffs pray as follows, to wit:

1. That each and all of the provisions of the Stock Yards Act in so far as they pertain to these plaintiffs severally, i. e., subdivision (b) of paragraph 6 of Section 2 of said act, subdivision (d) of Section 301 of said act, Section 303 of said act, subdivision (a) of Section 308 of said act, Section 315, subdivisions (a) and (b) of Section 312 of said act, subdivisions (a) and (b) of Section 314 of said act, and Sections 315, 401 and 403 of said act and each and all of the said rules and regulations promulgated by the Secretary of Agriculture in so far as they pertain to these plaintiffs be declared unconstitutional and void, because

They violate Article 1, Section 8, Clause 3 of the Constitution and the Fourth, Fifth, Eighth and Tenth Amendments to the Constitution in that

(a) They attempt to regulate commerce which is not commerce with foreign nations and is not commerce among the several states and is not commerce with the Indian tribes, but is commerce that is wholly and exclusively intrastate that is carried on by these plaintiffs in the purchase or sale of live stock;

(b) They transgress the right of the plaintiffs to be secure in their persons, houses, papers and effects against unreasonable searches and seizures;

(c) They deprive these plaintiffs severally of life, liberty or property without due process of law, and in effect, take private property for public use without just compensation;

(d) They impose excessive fines and inflict cruel and unusual punishments;

2. That the defendant, his agents, servants, and subordinates be enjoined and restrained from in any manner enforcing or attempting to enforce against the plaintiffs, their

officers, agents, servants and employees or any of them, any of the pains, penalties and forfeitures provided in and by the Stock Yards Act or by any rule or regulation of the Secretary of Agriculture issued thereunder, and from arresting or prosecuting, or attempting to arrest or prosecute, the plaintiffs, their officers, agents, servants and employees, or any of them, for or on account of any alleged violation by them or any of them of any of the provisions of the Stock Yards Act or of any of the rules or regulations now promulgated or that may hereafter be promulgated by the Secretary of Agricultulre; and from in any manner seizing or attempting to seize or causing to be seized any of the property of the plaintiffs, their officers, agents, servants and employees, or of any of them, for or on account of any alleged violation of the Stock Yards Act or of any rule or regulation now promulgated or that may hereafter be promulgated by the Secretary of Agriculture under the authority thereof.

3. That a temporary injunction or other appropriate relief as above prayed be granted temporarily restraining the defendant, his agents, employees and subordinates, and each of them, pending the final hearing of this cause, from in any manner enforcing or attempting to enforce against the plaintiffs, their officers, agents, servants and employees, or any of them, any of the pains, penalties and forfeitures provided in the Stock Yards Act or by virtue of any rule or regulation of the Secretary of Agriculture now promulgated, or that may hereafter be promulgated, under authority thereof, and from arresting or prosecuting, or from attempting to arrest or prosecute, the plaintiffs, their officers, agents, servants and employees or any of them, for or on account of any violation by them, or any of them, of any of the provisions of the Stock Yards Act or of any of the rules or regulations of the Secretary of Agriculture, promulgated, or that may hereafter be promulgated, under the authority thereof.

4. That a rule or order be entered herein upon the defendant, returnable at a short day to be fixed by this honorable court, requiring him to appear and show cause why a temporary injunction should not issue as prayed herein.

5. For such other and further relief as may be meet and proper in the premises.

May it please your Honors, to grant unto the plaintiffs a writ of subpoena to be directed to the said Charles F. Clyne,

District Attorney for the Northern District of Illinois, commanding and requiring him to appear herein and to answer, but not under oath, answer under oath being hereby expressly waived, the several allegations in this bill contained.

MAYER, MEYER, AUSTRIAN & PLATT,
Solicitors for Plaintiffs.

LEVY MAYER,
Of Counsel.

State of Illinois, }
County of Cook. } ss.

James Eugene Burton, James Lowell Cook, John Henry Keiner, Jr., John William Kelly, William Henry Mooney, Charles Le Roy Wagner, and William Leslie Walsh, each being first duly sworn, deposes and says that he is a citizen of the State of Illinois and a resident of the City of Chicago in said state, that he is one of the plaintiffs named in the foregoing bill in equity, that he has read the said bill in equity, and that the statements therein contained are true, except as to those allegations therein stated to be on information and belief, and, as to those, he believes them to be true.

(Signed) JAMES EUGENE BURTON,
" JAMES LOWELL COOK,
" JOHN HENRY KEINER, JR.,
" JOHN WILLIAM KELLY,
" WILLIAM HENRY MOONEY,
" CHARLES LE ROY WAGNER,
" WILLIAM LESLIE WALSH.

Subscribed and sworn to before me this 28th day of November, 1921.

JAS. L. JONES,
(Seal) *Notary Public in and for Cook County, Illinois.*

My commission expires Dec. 16, 1924.

(Endorsed) Filed Nov 28-1921 John H. R. Jamar Clerk.

And on, to wit, the 29th day of November, 1921, came the plaintiffs by their attorneys and filed in the Clerk's office of said Court their certain Motion for Temporary Injunction in words and figures following, to wit:

IN THE DISTRICT COURT OF THE UNITED STATES

Northern District of Illinois

Eastern Division.

James Eugene Burton, James Lowell Cook, John Henry Keiner, Jr., John William Kelly, William Henry Mooney, Charles LeRoy Wagner and William Leslie Walsh,
vs.
Charles F. Clyne, United States District Attorney for the Northern District of Illinois.

In Equity. 2499

MOTION

Now come the plaintiffs, by Mayer, Meyer, Austrian & Platt, their solicitors and counsel, and move the court to grant the issuance herein of a temporary injunction as prayed in the bill of complaint herein, restraining the defendant Charles F. Clyne, U. S. District Attorney for the Northern District of Illinois, his agents, employes and subordinates, and each of them, pending the final hearing of this cause, from in any manner enforcing or attempting to enforce against the plaintiffs, their officers, agents, servants and employes, or any of them any of the pains, penalties and forfeitures provided in the Act of Congress approved August 15, 1921, entitled "An Act to Regulate Interstate and Foreign Commerce in Live Stock, Live Stock Products, Dairy Products, Poultry, Poultry Products and Eggs, and for other purposes," which Act is in said Bill of Complaint and this Motion, called Stock Yards Act, or by virtue of any rule or regulation of the Secretary of Agriculture now promulgated or that may hereafter be promulgated under authority thereof, and from arresting or prosecuting or from attempting to arrest or prosecute or causing to be arrested or prosecuted, their officers, agents, servants and employees or any of them, for or on account of any violation by them or any of them of any of the provisions of the said Stock Yards Act or of any of the rules or regulations of the Secretary of Agriculture promulgated or that may hereafter be promulgated under the authority thereof.

And in support of this motion, the plaintiffs present to this court their sworn bill of complaint heretofore filed herein.

MAYER, MEYER, AUSTRIAN & PLATT,
Solicitors for said plaintiffs.

LEVY MAYER,
Of Counsel.

(Endorsed) Filed Nov 29-1921 John H. R. Jamar Clerk.

And on, to wit, the 2nd day of December, 1921, came the Defendant and filed in the Clerk's office of said Court his certain Motion to Dismiss Bill in words and figures following, to wit:

IN THE DISTRICT COURT OF THE UNITED STATES

Northern District of Illinois

Eastern Division.

James Eugene Burton, James Lowell Cook, John Henry Keiner, Jr., John William Kelly, William Henry Mooney, Charles LeRoy Wagner and William Leslie Walsh,
vs.
Charles F. Clyne, United States District Attorney for the Northern District of Illinois.

In Equity.
No. 2499

MOTION TO DISMISS BILL BY THE DEFENDANT, CHARLES F. CLYNE, UNITED STATES DISTRICT ATTORNEY FOR THE NORTHERN DISTRICT OF ILLINOIS.

To the Honorable the Judges of Said Court in Chancery Sitting:

Comes now the above-named defendant, Charles F. Clyne, United States District Attorney for the Northern District of Illinois, and moves the Court to dismiss the bill of complaint

herein filed in the above-entitled cause upon the following grounds, to wit:

1. For want of jurisdiction of the defendants and the subject matter of this action.

2. For want of equity in the bill.

3. That the bill seeks to enjoin enforcement of a valid and constitutional Act of Congress, approved August 15, 1921, entitled "An Act to regulate interstate and foreign commerce in live-stock, live-stock products, dairy products, poultry, poultry products, and eggs, and for other purposes," commonly known as the Packers and Stockyards Act, 1921.

4. That said bill seeks to restrain and enjoin the enforcement of the criminal statute, to wit, the above Act of Congress, and especially the provisions contained in Title III of said Act; and which said provisions of said Act are applicable to such persons as fall within the meaning and purview of the provisions of said Act, to wit, paragraph (d), which reads as follows: "The term 'dealer' means any person not a market agency, engaged in the business of buying or selling in commerce livestock at a stockyard, either on his own account or as the employee or agent of the vendor or purchaser."

CHARLES F. CLYNE,
United States Attorney, and the Defendant.

BAYARD T. HAINER,
Attorney for the Packers and Stockyards Administration, United States Department of Agriculture,
Of Counsel.

(Endorsed) Filed Dec 2-1921 John H. R. Jamar Clerk.

And on to-wit: the 20th day of December, 1921, there was filed in the office of the Clerk of said Court a certain opinion in words and figures as follows to-wit:

IN THE UNITED STATES DISTRICT COURT

Northern District of Illinois

Eastern Division.

James Eugene Burton, *et al.*, *Complainant*, *vs.* Charles F. Clyne, United States District Attorney, etc., } In Equity.

Before Evans, Landis and Fitz Henry, sitting in banc to hear application for temporary injunction.

Per Curiam: For the reasons set forth in the memorandum filed in *Stafford et al.* v. *Wallace, et al.* the application for a temporary injunction is denied.

IN THE UNITED STATES DISTRICT COURT

Northern District of Illinois

Eastern Division.

T. B. Stafford, *et al.*, *vs.* Henry C. Wallace, Secretary of Agriculture, *et al.* } In Equity No. 2498.

Before Evans, Landis and Fitz Henry, sitting in banc to hear application for temporary injunction.

Per Curiam: The question for determination is the constitutionality of the "Packers and Stock Yards Act 1921." Complainants very squarely and ably presented their attack upon the Act, denying that the commerce regulated is interstate in character.

The Government by its motion to dismiss has chosen to accept the statement of facts set forth in complainants' bill.

We are not, however, called upon to dispose of all questions which may be raised by the enforcement of this Act, but merely to determine whether the business of the live stock

commission men and dealers in live stock in the Chicago stock yards may be regulated by Congress. The reasonableness of any rules or regulations is not before us. Moreover, the Act may stand although certain sections of it may fall. Sec. 408.

In support of their positions complainants rely upon *Hammer* v. *Dagenhart*, 247 U. S. 251; *Hopkins* v. *U. S.*, 171 U. S. 578; *Pa. R. R. Co.* v. *Knight*, 192 U. S. 21; *Ward Packing Co.* v. *Federal Trade Commission*, 264 Fed. 330; *D. A. Winslow & Co.* v. *Federal Trade Commission* (unreported C. C. A. Fourth Cir., Nov. 1, 1921, Federal Trade Commission Service, 2nd Ed., 637), and contend that the question is settled by these decisions. While the decision in *Hopkins* v. *U. S. supra*, might well be cited by complainants with some confidence in support of their contention, we do not believe, in view of the language found in *Swift & Co.* v. *U. S.* 196 U. S. 375, that this case controls the present controversy.

When does interstate commerce begin? When does it end? What are its instrumentalities, the agencies by which it is conducted? The answers to these questions may in themselves raise further questions. For example, a railroad engaged in carrying interstate shipments is subject to Congressional regulation under the commerce clause of the constitution. As incidental to this power Congress has enacted legislation requiring certain kinds of equipment and certain kinds of rolling stock, viz., engines with powerful search lights and boilers of a special type, and it has enacted legislation respecting the liability of the railroad to the employees who ride in the engine or upon the train and operate the cars engaged in carrying interstate commerce.

Likewise, Congress has within the exercise of its power enacted legislation regulating the feeding and handling of live stock in interstate shipment, required the erection of stock yards where the live stock may be unloaded and watered and fed in transit. It has authorized the preparation of the bill of lading used in interstate shipment. Illustration could be multiplied indefinitely.

But the question recurs: when does the interstate shipment end? Does the handling of the stock by the live stock dealers and the live stock commission men in the stock yards commence after the interstate shipment is ended, or are they instrumentalities operating within one of the instrumentalities of interstate commerce? Is the terminal facility, so far

as Congressional regulation is concerned, separate and distinct from the railroad engine or the railroad cars, the engineers and conductors? Or do they together combine to make up interstate commerce? May the regulation respecting the shipment of live stock in interstate commerce continue throughout the entire shipment, but at the terminal points escape the regulatory control of Congress? What brings the railroad companies, the servants engaged in operating them, the instrumentalities by which the business is conducted, within the provision of the commerce clause of the United States Constitution? Obviously and unquestionably it is the character of the commerce conducted. If the shipment, if the commodity carried be interstate as distinguished from intra-state, it and the instrumentalities by which it is carried are subject to regulation.

That the stock yards are subject to regulation as a part of the interstate shipment has been judicially determined and is not now challenged by complainants. The stock yards, the live stock depots of the railroads, are as necessary a part of the carriage as the passenger depots and the freight depots, or as the yards into which interstate shipments are unloaded for the purpose of feeding and watering. If Congress can say to the railroads that the engine which is used to haul the interstate shipment is a subject of Congressional regulation, that the engineer who sits in the cab and operates the engine is such a subject, that his contract and his claim for liability in case of death and his hours of service may be regulated by act of Congress, then can the court deny to the same body the right to legislate respecting the terminal facilities, the stock yards, the instrument as essential to the completed interstate shipment as the engine or the engineer.

Are stock yards, which are nothing more than mere live stock depots into and through which the current of interstate commerce flows, instrumentalities of interstate commerce?

The answer must be in the affirmative, for the stock yards are as distinctly employed in that commerce and are as indispensable to it as are the cattle cars, engines and rails of the railroad which bring the subject matter of the commerce from one state to the stock yards in another, for sale for slaughter or reconsignment.

When once we consider that the stock yards themselves are instrumentalities of interstate commerce, then, the con-

clusion is irresistible that the regulatory powers of Congress apply to those engaged in or participating in that commerce within the stock yards, and we think that the Supreme Court in *Swift* v. *United States, supra,* meant to cover this situation when it said:

"When cattle are sent for sale from a place in one State, with the expectation that they will end their transit, after purchase, in another, and when in effect they do so, with only the interruption necessary to find a purchaser at the stock yards, and when this is a typical, constantly recurring course, the current thus existing is a current of commerce among the States, and the purchase of the cattle is a part and incident of such commerce."

The recent decision of the Supreme Court in *Dahnke-Walker Milling Company* v. *C. T. Bondurant* likewise supports this conclusion. The court says: "Such commerce is not confined to transportation from one State to another, but comprehends all commercial intercourse between different States and all the component parts of that intercourse. Where goods in one State are transported into another for purposes of sale the commerce does not end with the transportation, but embraces as well the sale of the goods after they reach their destination and while they are in the original packages. *Brown* v. *Maryland,* 12 Wheat. 419, 446-447; *American Steel & Wire Co.* v. *Speed,* 192 U. S. 500, 519. On the same principle, where goods are purchased in one State for transportation to another the commerce includes the purchase quite as much as it does the transportation. * * * In no case has the court made any distinction between buying and selling or between buying for transportation to another State and transporting for sale in another State. Quite to the contrary, the import of the decisions has been that if the transportation was incidental to buying or selling it was not material whether it came first or last."

The motion for a temporary injunction is denied.

(Endorsed) Filed Dec 20-1921 John H. R. Jamar Clerk.

And afterwards, to wit, on the 29th day of December, 1921, being one of the days of the regular December term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable Kenesaw M. Landis, District Judge, Evan A. Evans, Circuit Judge and Louis Fitz Henry District Judge, sitting en Banc, appears the following Decree to wit:

IN THE DISTRICT COURT OF THE UNITED STATES

For the Northern District of Illinois

Eastern Division

Thursday, December 29, A. D. 1921.

Present: Honorable Kenesaw M. Landis, District Judge.

James Eugene Burton, James Lowell Cook, John Henry Keiner, Jr., John William Kelly, William Henry Mooney, Charles LeRoy Wagner, and William Leslie Walsh,
vs.
Charles F. Clyne, U. S. District Attorney for the Northern District of Illinois.
} In Equity 2499.

DECREE.

This cause coming on this day to be heard before the Honorable Evan A. Evans, United States Circuit Judge, Honorable Kenesaw M. Landis, and Honorable Louis Fitzhenry, United States District Judges, upon the application of the plaintiffs for a temporary injunction and the plaintiffs being now here represented by their counsel, Levy Mayer, Esq., and the defendant by its counsel, Bayard T. Hainer, Esq., and the Court having heard the arguments of said counsel and being fully advised in the premises and the opinion of the Court in said cause upon said application for said temporary injunction having heretofore been filed,

Now, therefore, in accordance with said opinion, It Is Ordered, Adjudged and Decreed that the application for a tem-

porary injunction be and the same hereby is denied, to the entry of which decree the plaintiffs object and except.

And thereupon the plaintiffs presented their assignment of errors, appeal bond and their petition for appeal, praying for an appeal from the foregoing decree to the Supreme Court of the United States and It Is Ordered that the bond be and the same hereby is approved, the assignment of errors and petition for appeal be filed and that the appeal to the Supreme Court of the United States be and the same is hereby granted.

Enter:

KENESAW M. LANDIS
Judge.

December 29th 1921.

And on, to wit, the 29th day of December, 1921, came the plaintiffs by their attorneys and filed in the Clerk's office of said Court their certain Petition for Appeal in words and figures following, to wit:

IN THE DISTRICT COURT OF THE UNITED STATES

For the Northern District of Illinois

Eastern Division

James Eugene Burton, James Lowell Cook, John Henry Keiner, Jr., John William Kelly, William Henry Mooney, Charles LeRoy Wagner, and William Leslie Walsh, *vs.* Charles F. Clyne, U. S. District Attorney for the Northern District of Illinois.	In Equity 2499.

PETITION FOR APPEAL

The plaintiffs, James Eugene Burton, James Lowell Cook, John Henry Keiner, Jr., John William Kelly, William Henry Mooney, Charles LeRoy Wagner, and William Leslie Walsh, respectfully represent unto the Court that they are and each of them is aggrieved by the order denying them a temporary injunction entered in this case on December 29th, 1921, for

the reasons set forth in the assignment of errors hereto attached.

Wherefore, the plaintiffs pray that an appeal may be granted them to the Supreme Court of the United States and that a transcript of the record, proceedings and papers upon which said decree was made, duly authenticated may be sent to the Supreme Court of the United States, to the end that said decree may be reviewed and if found erroneous, reversed.

LEVY MAYER
Counsel for James Eugene Burton, James Lowell Cook, John Henry Keiner, John William Kelly, William Henry Mooney, Charle LeRoy Wagner, and William Leslie Walsh.

(Endorsed) Filed Dec 29-1921 John H. R. Jamar Clerk.

And on, to wit, the 29th day of December, 1921, came the plaintiffs by their attorneys and filed in the Clerk's office of said Court their certain Assignment of Errors in words and figures following, to wit:

IN THE DISTRICT COURT OF THE UNITED STATES

For the Northern District of Illinois

Eastern Division

James Eugene Burton, James Lowell Cook, John Henry Keiner, Jr., John William Kelly, William Henry Mooney, Charles LeRoy Wagner, and William Leslie Walsh,
vs.
Charles F. Clyne, U. S. District Attorney for the Northern District of Illinois.
} In Equity 2499.

ASSIGNMENT OF ERRORS.

Now come the plaintiffs, James Eugene Burton, James Lowell Cook, John Henry Keiner, Jr., John William Kelly, William Henry Mooney, Charles LeRoy Wagner, and Wil-

liam Leslie Walsh, and file this, their assignment of errors in the above entitled cause, to-wit:

1. The Court erred in not directing the issuance of a temporary injunction as moved for by plaintiffs.

2. The Court erred in holding that the Act of Congress approved August 15, 1921, entitled "An Act to regulate interstate and foreign commerce in livestock, livestock products, dairy products, poultry, poultry products and eggs and for other purposes" (and hereinafter referred to as the "Stockyards Act") is constitutional.

3. The Court erred in holding that the said Stockyards Act is valid because

(a) Said Act violates Article 1, Section 8, Clause 3 of the Constitution of the United States.

(b) The Fourth Amendment to said Constitution.

(c) The Fifth Amendment to said Constitution.

(d) The Tenth Amendment to said Constitution.

Wherefore, the plaintiffs pray that the decree herein may be reversed.

LEVY MAYER
Counsel for Plaintiffs.

(Endorsed) Filed Dec 29 1921 John H. R. Jamar Clerk.

And on to-wit: the 29th day of December, 1921, came James Eugene Burton as principal and Fidelity and Deposit Company of Maryland as surety and filed in the office of the Clerk of said Court a certain Bond on Appeal in words and figures following to-wit:

Know All Men By These Presents that we, James Eugene Burton as principal and Fidelity and Deposit Company of Maryland, as surety, are held and firmly bound unto Charles F. Clyne as District Attorney of the United States, Northern District of Illinois, in the full and just sum of Five Hundred Dollars ($500) to be paid to the said Charles F. Clyne as such District Attorney of the United States, his executors, administrators, successors or assigns, for which payment well and truly to be made we bind ourselves and our respective ex-

ecutors, administrators, successors and assigns firmly by these presents.

Sealed with our seals and dated this 29th day of December, 1921.

Whereas lately at a session of the District Court of the United States for the Northern District of Illinois, Eastern Division thereof, in a suit pending in said court as No. 2499 in equity, between said James Eugene Burton and others and Charles F. Clyne as District Attorney of the United States as aforesaid, a decree was rendered against said James Eugene Burton and others, plaintiffs therein, and said plaintiffs having prayed for and been allowed an appeal from said decree to the Supreme Court of the United States and having filed a copy thereof in the Clerk's office of said Court.

Now the condition of the above obligation is such that if the said plaintiffs shall prosecute their said appeal to effect and answer all damages and costs if they fail to make their plea good, then the above obligation to be void, otherwise to remain in full force and virtue.

JAMES EUGENE BURTON (Seal)

FIDELITY AND DEPOSIT COMPANY OF MARYLAND (Seal)

By WM. G. KRESS

(Seal) *Agent and Attorney-in-Fact*

Approved this 29th day of December, 1921.

K. M. L.

Judge of the United States District Court in and for the Northern District of Illinois, Eastern Division thereof.

(Endorsed) Filed Dec 29-1921 John H. R. Jamar Clerk.

IN THE DISTRICT COURT OF THE UNITED STATES

Northern District of Illinois

Eastern Division

James Eugene Burton, James Lowell Cook, John Henry Keiner, Jr., John William Kelly, William Henry Mooney, Charles LeRoy Wagner, and William Leslie Walsh,
Appellants,

vs.

Charles F. Clyne, United States District Attorney for the Northern District of Illinois.
Appellees.

PRAECIPE FOR RECORD.

To the Clerk of said Court:

You will please prepare for use on the appeal heretofore allowed in the above entitled cause a complete transcript of record.

LEVY MAYER
Counsel for Plaintiffs.

Dec 30-21

(Endorsed) Filed Dec. 30—21 John H. R. Jamar Clerk.

Northern District of Illinois } ss:
Eastern Division }

I, John H. R. Jamar, Clerk of the District Court of the United States for the Northern District of Illinois, do hereby certify the above and foregoing to be a true and complete transcript of the proceedings had of record made in accordance with Praecipe filed in this Court in the cause entitled James Eugene Burton, James Lowell Cook, John Henry Keiner, Jr., John William Kelly, William Henry Mooney, Charles LeRoy Wagner, and William Leslie Walsh, vs. Charles F. Clyne, U. S. District Attorney for the Northern

District of Illinois, as the same appear from the original records and files thereof now remaining in my custody and control.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said Court at my office, in the City of Chicago, in said District, this 4th day of January, A. D. 1922.

JOHN H. R. JAMAR,
Clerk.

(Seal)

The United States of America, ss. To Charles F. Clyne, Greeting:

Whereas, James Eugene Burton, James Lowell Cook, John Henry Keiner, Jr., John William Kelly, William Henry Mooney, Charles LeRoy Wagner and William Leslie Walsh, have lately appealed to the Supreme Court of the United States from a decree lately rendered in the District Court of the United States for the Northern District of Illinois, made in favor of you, the said Charles F. Clyne, and have filed the security required by law; you are therefore hereby cited to appear before the said Supreme Court, at the city of Washington, within thirty days from the date hereof to do and receive what may appertain to justice to be done in the premises.

Given under my hand at the City of Chicago, in the Seventh Circuit, this thirtieth day of December, in the year of our Lord, one thousand nine hundred and twenty-one.

KENESAW M. LANDIS
Judge of the District Court of the United States for the Northern District of Illinois.

Received a copy of the above citation this 30th day of December 1921

W. A. SMALL
Chief Clerk
U. S. Atty.

State of Illinois } ss.
County of Cook }

David F. Rosenthal being first duly sworn on oath deposes and says that he served the above citation on the said Charles F. Clyne District Attorney of the United States in and for the Northern District of Illinois by leaving a true and correct copy of the same with W. A. Small, the person in charge of the office of said Charles F. Clyne in the Federal Bldg. Chicago, Illinois, all done on December 30, 1921.

DAVID F. ROSENTHAL

The foregoing affidavit of service was subscribed and sworn to by the said David F. Rosenthal, before me a notary public in and for the County of Cook and State of Illinois this 30th Day of December, 1921.

HENRY N. WEINBERG

(Seal) *Notary Public, Cook County, Illinois.*

(Endorsed) G. No. 2499 T. No. ..... U. S. District Court In Equity James Eugene Burton, et al vs. Charles F. Clyne Citation Filed Dec 30 1921 at .....o'clock .....M. John H. R. Jamar Clerk. Mayer, Meyer, Austrian & Platt Continental and Commercial Bank Building Chicago Telephone Wabash 6400

IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1921.

No. 687

T. B. STAFFORD AND S. B. STAFFORD, COPARTNERS DOING BUSINESS AS STAFFORD BROTHERS ET AL.,
Appellants,

vs.

HENRY C. WALLACE, SECRETARY OF AGRICULTURE, AND CHARLES F. CLYNE, UNITED STATES ATTORNEY FOR THE NORTHERN DISTRICT OF ILLINOIS,
Appellees.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

BRIEF FOR APPELLANTS.

EDWIN W. SIMS,
ALBERT G. WELCH,
ELWOOD G. GODMAN,
FREDERIC R. DE YOUNG,
Counsel for Appellants.

BUNTHORP-WARDEN PRINTING COMPANY, CHICAGO.

SUBJECT INDEX.

APPENDIX.

CITATIONS.

IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1921.

T. B. STAFFORD AND S. B. STAFFORD, COPARTNERS DOING BUSINESS AS STAFFORD BROTHERS ET AL.,
Appellants,

vs.

HENRY C. WALLACE, SECRETARY OF AGRICULTURE, AND CHARLES F. CLYNE, UNITED STATES ATTORNEY FOR THE NORTHERN DISTRICT OF ILLINOIS,
Appellees.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

BRIEF FOR APPELLANTS.

STATEMENT OF THE CASE.

MAY IT PLEASE THE COURT:

The plaintiffs, who are individually engaged in the business of live stock commission merchants at the live stock market located in the Union Stock Yards, at Chicago, having a common interest in the subject matter of this suit, joined in filing the bill of complaint herein on November 28, 1921, to enjoin the Secretary of Agricuture from putting into effect as to them, Titles III and IV of the act of Congress entitled "An act to regulate interstate and foreign commerce in live stock, live-stock products, dairy products, poultry, poultry products and eggs and for other purposes" otherwise known as the Packers and Stockyards Act, 1921, and also

to enjoin the United States Attorney for the Northern District of Illinois from instituting civil or criminal proceedings against the individual plaintiffs for failure to comply with said act of Congress.

Section 316 of Title III of said act provides that "the provisions of all laws relating to the suspending or restraining the enforcement, operation or execution of, or the setting aside in whole or in part, the orders of the Interstate Commerce Commission are made applicable to the jurisdiction, powers and duties of the Secretary (of Agriculture) in enforcing the provisions of this title and to any persons subject to the provisions of this title."

The appropriate section of the Act of October 22, 1913, Chapter 32, "relating to the suspending or restraining the enforcement, operation or execution of, or the setting aside in whole or in part the orders of the Interstate Commerce Commission" provides that no interlocutory injunction in such case shall be issued or granted "unless the application for the same shall be presented to a Circuit or District Judge, and shall be heard and determined by three judges, of whom at least one shall be a Circuit Judge, and unless a majority of said three judges shall concur in granting such application." (Sec. 998 U. S. Comp. Stat. Ann.)

The plaintiffs, on November 29, 1921, filed their written motions herein for an interlocutory injunction against the Secretary of Agriculture and for a temporary injunction and temporary restraining order against the United States Attorney, as prayed for in the bill of complaint. (Rec., 34-36.) The motion was argued before, and heard and determined by, Judge Evans, United States Circuit Judge for the Seventh Circuit, Judge Landis, District Judge for the Northern District of Illinois, and Judge

FitzHenry, District Judge for the Southern District of Illinois. (Rec., 41-46.)

The defendant, Henry C. Wallace, Secretary of Agriculture, was served with a chancery subpoena by the Marshal of the District of Columbia on December 3, 1921 (Rec., 40), in accordance with the procedure adopted under Section 316, Title III of said Packers and Stockyards Act, 1921. (See Sec. 995 U. S. Comp. Stat. Ann.)

The defendant, Henry C. Wallace, as Secretary of Agriculture, filed his special appearance on December 2, 1921, for the purpose of objecting to the jurisdiction of his person. (Rec., 37.) The defendant, Charles F. Clyne, United States Attorney, on December 2, 1921, filed his written motion to dismiss the bill for want of jurisdiction and want of equity. (Rec., 38.) Neither of these questions are referred to in the opinion of the court. Upon the hearing of the plaintiffs' motions for an interlocutory injunction and temporary restraining order, the court (Judges Evans, Landis and FitzHenry) considered the bill of complaint upon its merits holding that all allegations of fact were admitted by the motion to dismiss, and entered an order on December 31, 1921, denying plaintiffs' motions for an interlocutory injunction against the Secretary of Agriculture, and for a temporary injunction and temporary restraining order against the United States Attorney, and denying said interlocutory injunction and temporary restraining order to which action the plaintiffs excepted. (Rec., 44-46.) (See opinion, Rec., 41-44.)

The plaintiffs have appealed to this court from the order denying their motions for an interlocutory injunction and temporary injunction and temporary restraining order.

The Act of Congress herein involved purports by its title to be "An act to regulate interstate and foreign commerce in live stock," etc. The appellants claim that they are not engaged in interstate or foreign commerce and that the statements of fact set out in their verified bill of complaint, and admitted by the motion to dismiss to be true, show affirmatively that they are not thus engaged and that therefore they are not amenable to regulation by the Secretary of Agriculture under said act. The portions of said act which relate to the business conducted by the plaintiffs are set forth in detail in the bill of complaint. Titles III and IV of the act undertake to confer upon the Secretary of Agriculture authority to supervise and control the business of the appellants in the buying and selling of live stock as aforesaid.

Section 301 of Title III defines the term "stockyards services" as follows:

> "(b) The term 'stockyards services' means services or facilities furnished at a stockyard in connection with the receiving, buying or selling on a commission basis or otherwise, marketing, feeding, watering, loading, delivery, shipment, weighing or handling in commerce of live stock";

and defines the term "market agency" as follows:

> "(c) The term 'market agency' means any person engaged in the business of (1) buying or selling in commerce live stock at a stockyard on a commission basis or (2) furnishing stockyards services." (T. of R., p. 10.)

There can be no doubt that the quoted language defining a "market agency" and "stockyards services" was intended to embrace the business of appellants, and that it has been so construed and interpreted by the appellee, Secretary of Agriculture, is made evident by the action of said Secretary of Agriculture in sending and causing to be sent to appellants and each of them certain blanks and forms of reports to be filled out and filed with

said Secretary of Agriculture, particularly a so-called form of registration blank to be used by them in registering under the act (Rec., p. 11), a copy of which is attached to the bill as Exhibit "A" (Rec., p. 28), and further by the adoption or promulgation under the claimed authority of Section 303 of said Act, of a certain regulation as follows:

> "Registration (Section 303, Title III) by market agencies and dealers shall be accomplished by properly filling out and delivering to the Packers and Stock Yards Administration at Washington, D. C., by mail or otherwise, a form which will be furnished upon request for the purpose." (Rec., p. 12.)

The Secretary is authorized by the act to exercise supervision over the business of appellants even to the extent of determining and fixing the schedules of commission charges which may be made by appellants for their services in buying and selling live stock as aforesaid for their customers and shippers. The Act requires, among other things, that appellants and each of them shall register with said Secretary of Agriculture under pain of being deprived of the right to pursue their lawful occupation and calling aforesaid, and, in case of attempted continuance in the conduct of their business after failure to register, they become liable to a penalty as to each live stock commission merchant of five hundred dollars ($500) and twenty-five dollars ($25) for each day such business is thus continued. Said Act also provides that failure of the appellants, or any of them, to publish and post their schedules of rates and commission charges, as required by the Act, and to file the same with the Secretary of Agriculture shall result in the assessment of other and additional penalties and forfeitures of a like character and also imposes a liability to a criminal prosecution with the punishment upon conviction of a fine of not more than five thousand dollars

($5,000) or imprisonment of not more than one year, or both.

Section 401 of Title IV of said Act requires appellants to keep accounts, records and memoranda disclosing fully all transactions involved in their business in a manner to be prescribed by the Secretary and in form prescribed by him, and for failure so to do a punishment is provided of a fine of not more than five thousand dollars ($5,000) or imprisonment for not more than three years, or both.

Numerous other provisions of Titles III and IV of said Packers and Stock Yards Act, 1921, designed and intended to regulate and control the conduct of their business by appellants in practically all of its essentials are referred to and described in appellants' bill. (Rec., pp. 10 to 16 incl.)

The provisions of the Act of Congress requiring the posting of notice in a stockyard (claimed to be under the jurisdiction of the Secretary of Agriculture), that the supervision and control thereof had been taken over by the Secretary were all duly complied with on November 1, 1921 (Rec., p. 11), by the public posting of such notice in the Union Stock Yards, Chicago, Illinois, where appellants are engaged in business. The act required appellants to comply within 30 days of the posting of such notice, with the provisions of Section 303 of Title III of the Act of Congress requiring every market agency engaged in business at such stockyard to register with the Secretary, under such rules and regulations as the Secretary may prescribe (Rec., p. 12); and the act required appellants to thus register upon notice being given them of the adoption and promulgation of the regulation of the Secretary, hereinbefore set out and referred to, and the receipt by

them of the blanks hereinbefore referred to from the Secretary to be used by them for that purpose. Thus, the law, the regulation, and the sending of the blanks constituted a direction and order by the Secretary of Agriculture to the appellants and each of them to register pursuant to the requirements of said Packers and Stock Yards Act, 1921.

By paragraph (b) of Section 314 of Title III of said Act of Congress which provides:

> "It shall be the duty of the various district attorneys, under the direction of the Attorney General, to prosecute for the recovery of forfeitures. The costs and expenses of such prosecution shall be paid out of the appropriation for the expenses of the courts of the United States."

it became and was the duty of the appellee, Charles F. Clyne, United States attorney for the Northern District of Illinois, in case of a failure to observe the requirements of said Act of Congress and the directions and orders of the Secretary of Agriculture thereunder, particularly in the matter of registering and filing schedules of rates and commission charges, to prosecute suits against the appellants, civil or criminal in nature as might be appropriate, for the collection of the penalties and forfeitures provided and the infliction of the punishments fixed by the statute for such claimed infractions.

Prior to the expiration of the thirty-day period aforesaid and on November 28, 1921, appellants filed their bill of complaint in the District Court of the United States for the Northern District of Illinois praying the protection of the court by injunction or restraining order against the enforcement of said Packers and Stockyards Act, 1921, against appellants and each of them and against any proceedings, civil or criminal, by the appellees, or either of them, against the appellants for any failure then or thereafter on the part of any of them to

observe and comply with the provisions of said Title III and IV of said act. (Rec., pp. 18, 19, 24 and 25.)

The bill alleges that the Union Stock Yards at Chicago, Illinois, wherein the appellants are engaged in business is a live stock market in which cattle, calves, sheep, swine and goats, consigned to various persons at said stockyards from various points in the United States, are dealt in, bought and sold (Rec., 8).

The business of the individual appellants consists in the receiving, buying, selling and care of said live stock at said Union Stock Yards upon a commission basis for the account of the consignors of such live stock, such commission being paid to appellants upon an established per head rate for the services performed by them in buying, handling and caring for such live stock at such Union Stock Yards, Chicago. The customers of appellants ship live stock to them to be sold upon the open market at the Union Stock Yards, Chicago, to the highest bidder for cash and it is the duty of the individual appellants to arrange for the care and handling, including proper feeding and watering of such live stock at the said market and to sell such live stock upon the open market at said Union Stock Yards to the highest bidder for cash, using their skill, judgment and experience as live stock salesmen to secure the highest price possible in a competitive market for such live stock.

The live stock handled by appellants comes into their possession only after the same has been fully delivered by the common carrier, which transported it, at its point of destination and has ceased to be within or under the care and control of such common carrier and with respect to which said common carrier has no further duty to perform. Appellants then take such live stock after its delivery at point of destination, which in the instant case is the Union Stock Yards, Chicago, Illinois, to pens

in said public market at said stockyards allotted to the appellants for their use in caring for and exhibiting said live stock for sale and said live stock are there upon the open public market at said Union Stock Yards sold by the appellants to the highest bidders for cash. Said live stock are, upon sale by appellants, delivered to the purchaser, who takes them into his custody and care and does with them as he will. The entire connection of appellants with the handling of live stock consigned to them and all of the services performed by them in the sale or purchase of such live stock are done and performed at said Union Stock Yards, Chicago, Illinois, and no control is exercised by them over such live stock before they reach their possession at the railroad delivery platform in said Union Stock Yards, Chicago, or after they leave the possession of appellants after sale by them as aforesaid at said Union Stock Yards, Chicago. Appellants have absolutely nothing to do either with the transportation to the said Union Stock Yards, Chicago, or the handling of said live stock before delivery at the terminal or the transportation from the Union Stock Yards, Chicago, after sale, if any transportation occurs. (Rec., 9.)

In the performance of such duties and the carrying on of the business, appellants and each of them compete with each other and with other market agencies and dealers in the buying and selling of live stock upon said public market at Chicago. (Rec., pp. 8 and 9.)

Their sole compensation is the commission paid them, which is deducted by the appellants individually from the proceeds of the sale. The balance of such proceeds being remitted by them to their customers and shippers, respectively.

The amount of the commission collected by appellants for their services is in no way dependent upon or related

to the amount of money for which said live stock are bought or sold by them upon the market at the Union Stock Yards, and is in no way connected with or related to the transportation of said live stock in commerce either from points within the State of Illinois, or from points outside of the State of Illinois, to said Union Stock Yards at Chicago, or from the said Union Stock Yards at Chicago to points outside the State of Illinois, and such commission charges are in no way whatever affected by the fact of a consignment of live stock being either in whole or in part an interstate or an intrastate shipment. In other words, the commission is not figured upon the basis of the amount of the purchase or sale price but is figured upon a per head or per car rate regardless of the amount of money changing hands. Thus the quantity of live stock moving in commerce is not in the least diminished or affected through the commission charges made and collected by appellants for their services because the amount of such charges is not dependent upon the purchase or sale price. Such commission charges, in so far as they can be considered as a factor in determining the sale or purchase price or in any way affecting the same, can be so considered only as an expense item in the same way that freight, feeding and handling charges might be considered. To put the situation in another way, the live stock commission merchants' fees or commissions would be the same upon any given shipment of live stock regardless of whether or not the prevailing market value thereof was high or low. Upon consummating a sale plaintiffs deduct their per head commission charge, and the freight and yardage charges paid by them in connection with the handling, feeding and care of such live stock, pending their sale, and remit the proceeds to their customers as stated. Appellants in carrying on their business aforesaid act

merely as intermediaries between the purchaser and seller and in such capacity endeavor to secure for the owner the best available price upon the open market for the live stock which they sell, and to purchase for their principals such live stock as may be desired at the lowest procurable price upon the open market. (Rec., 9.)

They have no authority or control over the disposition of live stock after it is sold or purchased by them for others. The services performed and commissions received by them are the same, regardless of whether or not the live stock handled came originally from a point within or outside the State of Illinois or ultimately is transported to a point within or outside the State of Illinois. (Rec., 9.)

It is alleged that the live stock commission business transacted by the individual appellants constitutes their sole and only source of revenue and means of livelihood, that any unlawful interference with the control, management or conduct of their said business would and will result in immediate and irreparable damage to appellants and each of them. (Rec., 17.) That by Section 304 of Title III of said Packers & Stockyards Act, 1921, every market agency is required to furnish, upon reasonable request, without discrimination, reasonable stockyard services at such stockyard; that the business of each of the appellants is a private business not impressed with a public use and that appellants, and each of them, have the lawful right at any and all times to deal with and to refrain from dealing with whomsoever they may wish and that in carrying on their said business it is their lawful right to select their own customers (Rec., 14); that Section 305 of said Title III requires that all rates and charges for stockyard services furnished by a market agency shall be just, reasonable and nondiscriminatory and provides

that any unjust, unreasonable or discriminatory rate or charge is prohibited and declared to be unlawful; that the services performed by appellants, and each of them, are their own personal services and that they, and each of them, in his, their or its own right, have a lawful right to determine by bargain or negotiation with his, their or its customers what charge or rate of commission he, they or it may collect for such services, and that the question of reasonableness of the rates to be charged is a question to be determined between the commission man and his customers. (Rec., 14.)

It is also alleged that Section 306 of Title III empowers the Secretary of Agriculture in the last analysis to actually fix the charges which shall be made by appellants for their services, and for failure to abide by the requirements of said Section and the directions of the Secretary of Agriculture thereunder, appellants may be subjected to fine and imprisonment, and that appellants individually claim the right to fix and determine the commissions and charges acceptable to them individually for the performance of their respective services in the business in which they are engaged, and that any attempt to interfere with such right by the Secretary of Agriculture is unlawful, and that Congress in attempting to confer upon the Secretary such authority, as far as appellants are concerned and those engaged in the same or a similar line of business as herein described, exceeded the constitutional limitation of its power. (Rec., 15, 16.)

Appellants contend that the court erred in holding them amenable to said Act of Congress and in denying them injunctive relief and respectfully pray that the order herein appealed from be set aside and this cause remanded with directions to the District Court for the

Northern District of Illinois to enter an order granting the injunctive relief prayed in appellants' bill of complaint.

Specifically, appellants contend that said Titles III and IV of said Packers and Stockyards Act, 1921, as applied to them and to their business as live stock commission merchants, are, and each of the provisions thereof is, without authority under the Constitution in this:

1. Said Title III, and particularly Section 306, of said Packers and Stockyards Act, 1921, constitutes an attempt to regulate the private business of appellants not justified by the Commerce Clause of the Constitution of the United States (Section 8, Article 1 of the Constitution) because the services performed by appellants do not constitute interstate or foreign commerce and are not connected with or related to interstate or foreign commerce and have no effect whatever upon the free and unrestricted flow thereof between the states or with foreign nations and because said services are performed wholly within the State of Illinois.

2. Section 303 of Title III of said Act in prohibiting appellants from carrying on their business except under pain of heavy and excessive penalties, cumulative in character, unless appellants, and each of them, register with the Secretary of Agriculture, is invalid in that it attempts to deprive appellants of their property without due process of law in violation of Article V of the Amendments to the Constitution of the United States.

3. Said Title III and said Title IV, and each of the provisions thereof, in so far as they affect or attempt to affect the appellants, and the conduct of their business by appellants, are unconstitutional and invalid and in violation of Article X of the Amendments to the Constitution in that they constitute an attempt to

regulate, control and interfere with the business of appellants of a wholly intrastate character and attempt to regulate and control appellants in the rendering of personal services not connected with or a part of interstate or foreign commerce.

4. Paragraph (a) of Section 302 of said Title III of said Act is unconstitutional and invalid and in violation of Article V of the Amendments to the Constitution in that it excepts from the operations of said Title III and from the supervisory control of the Secretary of Agriculture all stockyards not having an area, exclusive of runs, alleys or passageways, of more than 20,000 square feet.

5. Titles III and IV of said Act, in so far as they relate to or affect the business of appellants, and appellants in the conduct of said business, are unconstitutional and invalid and not justifiable under the said Commerce Clause, and are further invalid and unconstitutional and in violation of Articles IV and V of the Amendments to the Constitution.

Specification of Errors Relied Upon.

I.

The District Court erred in entering the order and decree (Rec., pp. 44, 45, 46) denying the application of appellants for an interlocutory injunction against the appellee, Henry C. Wallace, Secretary of Agriculture, and for a temporary injunction and temporary restraining order against the appellee, Charles F. Clyne, United States Attorney for the Northern District of Illinois, as prayed in the verified bill of complaint of appellants.

Assignments of Error, Nos. 1, 2, 3, 4, 5 and 6.

II.

The District Court erred in holding that the Packers and Stockyards Act, 1921, and particularly Titles III and IV thereof as applied to appellants and the business in which they are, and each of them is, engaged, is a valid and legal enactment, and in holding that said business is of an interstate character and subject to regulation under said Packers and Stockyards Act, 1921, pursuant to the provisions of Section 8, Article 1 of the Constitution of the United States; and the court erred in not holding that said business of appellants, as described in their said verified bill of complaint, is an intrastate business and not subject to regulation and control by Congress.

Assignments of Error, Nos. 7, 8 and 9.

III.

The District Court erred in failing to hold that Title III and Title IV of said Packers and Stockyards Act, 1921, are, and each of the provisions thereof is, in so far as they affect, or attempt to affect, the appellants and the conduct of their business by appellants as described in said verified bill of complaint, invalid and unconstitutional and in violation of Article X of the Amendments to the Constitution of the United States and in violation of Article V of the Amendments to the Constitution.

Assignments of Error, Nos. 10, 11 and 12.

IV.

The District Court erred in failing to hold said Title III of said Packers and Stockyards Act, 1921, to be invalid and in violation of Article V of the Amendments to the Constitution of the United States because of the

provisions of Section 302, paragraph (a) of said Title III, which excepts from the operations of said Title III, and from the supervisory control of the Secretary of Agriculture, all stockyards not having an area, exclusive of runs, alleys or passageways, of more than 20,000 square feet.

Assignment of Error, No. 13.

V.

The District Court erred in failing and refusing to hold that said Title IV of said Packers and Stockyards Act, 1921, and particularly Section 401 of said Title IV, is unconstitutional and invalid as applied to appellants, and each of them, and their said business, under Article IV of the Amendments to the Constitution of the United States.

Assignment of Error, No. 14.

BRIEF OF ARGUMENT.

I.

THE REMEDY IN EQUITY.

A court of equity has power to enjoin threatened action by an official under an unconstitutional law or a threatened action under a constitutional law in excess of the power granted by such law.

Ex parte Young, 209 U. S. 123, 163, 165.
Truax, and Attorney General, v. *Raich*, 239 U. S. 33, 37, 38, 39.
Rast v. *Van Deman and Lewis*, 240 U. S. 342, 345, 355.
Hammer v. *Dagenhart*, 247 U. S. 251, 276.
Wilson v. *New et al.* 243 U. S. 332.
Ruppert v. *Caffey*, 251 U. S. 264, 281.
Public Service Company v. *Corboy*, 250 U. S. 153, 159.
United States v. *Lee*, 106 U. S. 196, 219, 220.
American School of Magnetic Healing v. *McAnnulty*, 187 U. S. 94, 109, 110.
Philadelphia Company v. *Stimson, Secretary of War*, 223 U. S. 605, 620.
Lane v. *Watts*, 234 U. S. 525, 540.
Northern Pacific Ry. v. *North Dakota*, 250 U. S. 135, 152.
Santa Fe R. R. v. *Lane*, 244 U. S. 492, 498.
Tedrow, United States Attorney, v. *A. T. Lewis & Son Dry Goods Company*, 255 U. S. 98.
Kennington et al. v. *Palmer et al.* 255 U. S. 100.
Waite et al. v. *Macy*, 246 U. S. 606.

Cumulative penalties may be assessed for violations of the provisions of the Packers and Stock Yards Act, 1921, and for that reason alone the law would be unconstitutional unless a means of testing its constitutional validity is afforded by a proceeding in equity. (*Ex parte Young, supra.*)

In the *Ex parte Young* case at page 155 the court said:

> "The various authorities we have referred to furnish ample justification for the assertion that individuals who, as officers of the state, are clothed with some duty in regard to the enforcement of the laws of the states and who threaten and are about to commence proceedings either of a civil or criminal nature to enforce against parties affected an unconstitutional act violating the Federal Constitution may be enjoined by a federal court of equity from such action."

The following language of the court from the same case at page 163 is pertinent:

> "It is further objected that there is a plain and adequate remedy at law open to the plaintiffs and that a court of equity therefore has no jurisdiction in such case. It has been suggested that the proper way to test the constitutionality of the act is to disobey it at least once, after which the company might obey the act pending subsequent proceedings to test its validity. But in the event of a single violation the prosecutor might not avail himself of the opportunity to make the test as obedience to the law was thereafter continued. He might think it unnecessary to start an inquiry. If, however, he should do so while the company was thereafter obeying the law, several years might elapse before there was a final determination of the question, and if it should be determined that the law was invalid, the property of the company would have been taken during that time without due process of law and there would be no possibility of its recovery."

In *Public Service Company* v. *Corboy*, 250 U. S. 153, at page 159, the court said:

> "Although a state may not be sued without its consent, nevertheless a state officer acting under color of his official authority may be enjoined from carrying into effect a state law asserted to be repugnant to the Constitution of the United States even though such injunction may cause the state law to remain inoperative until the constitutional question is judicially determined."

In the case at bar an injunction was sought against officials of the Government who in their official character were seeking to enforce against the appellants the provisions of a statute claimed by appellants to be invalid and unconstitutional as applied to them and their business. The same rule authorizing injunctive relief against defendants would apply as in the Corboy case, *supra*. This court has had before it a number of cases in which injunctive relief of the kind here sought has been asked for against officials of the Government. (*Ruppert* v. *Caffy*, 251 U. S. 264; *Wilson* v. *New et al.* 243 U. S. 332; *Philadelphia Co.* v. *Stimson*, 223 U. S. 605, 620.)

Injunctive relief is proper also against a Government officer who though proceeding under color of a constitutional law exceeds his authority thereunder in attempting to make an unconstitutional application of its provisions.

In *Philadelphia Company* v. *Stimson*, *supra*, at page 619, the court said:

> "The exemption of the United States from suit does not protect its officers from personal liability to persons whose rights and property they have wrongfully invaded (citing cases), and in case of an injury threatened by his illegal action the officer cannot claim immunity from injunction process. The principle has frequently been applied with respect to

> state officers seeking to enforce unconstitutional enactments (citing cases), and it is equally applicable to a federal officer acting in excess of his authority or under an authority not validly conferred." (Citing cases."

In *Santa Fe Pacific Railroad* v. *Lane, Secretary of the Interior,* 244 U. S. 492, wherein an injunction was sought against the Secretary of the Interior to prevent his insisting upon or giving effect to a demand made by him on the plaintiff for an advance deposit of money under an Act of Congress to cover the cost of surveying certain lands within the primary limits of a land grant made to the Atlantic & Pacific Railroad Company, the court in holding that a proceeding in equity for injunctive relief was proper said (page 498):

> "The plaintiff was not required in order to test the validity of the demand to permit the 90 days to pass and rely entirely upon defending such suit as might be brought by the Attorney General. On the contrary if the demand was unlawful, as we hold it was, the plaintiff was entitled to sue in equity to have the defendant enjoined from insisting upon or giving any effect to it. The hazards and embarrassment incident to any other course were such as to entitle it to act promptly and affirmatively and, of course, there was no remedy at law that would be as plain, adequate and complete as a suit such as this against the defendant."

Under the authority of the cases above referred to and cited there is no doubt that the action of the Secretary of Agriculture and the anticipated action by the United States attorney for the Northern District of Illinois in attempting to enforce the provisions of the Packers and Stock Yards Act, 1921, against the appellants could and should be enjoined if upon the allegations of the appellants' verified petition it clearly appears that appellants are not within the class of persons whose business may lawfully be regulated by Congress.

Furthermore, by the provisions of Section 316 of the Packers and Stock Yards Act, 1921, the law relating to the suspending and setting aside of orders of the Interstate Commerce Commission is made applicable to orders of the Secretary of Agriculture under that act. By the Act of October 22, 1913, 38 Stat. L. 219, a method is provided for hearing applications for interlocutory injunctions against the enforcement of orders of the Interstate Commerce Commission and the form of procedure fixed in the statute was the one followed in this case. (Rec., pp. 35, 36.)

A further ground of equitable jurisdiction arises from the fact that irreparable injury would necessarily result to the appellants and each of them in being forced as an alternative to complying with the Act to wholly discontinue the carrying on of their business unless at risk of incurring heavy penalties as described in the statement of the case herein. Such ground has been considered sufficient in the following cases:

International News Service v. *Associated Press*, 248 U. S. 215.

Board of Trade v. *Christe Grain & Stock Company*, 198 U. S. 236, 250.

Hammer v. *Dagenhart*, 247 U. S. 251.

There is no adequate remedy at law for the situation in which appellants find themselves. (*Ex parte Young*, 209 U. S. 123; *Smith* v. *Ames*, 169 U. S. 466.)

II.

THE INDIVIDUAL APPELLANTS ARE NOT ENGAGED IN INTERSTATE COMMERCE.

The business of appellants is that of buying and selling live stock at the Union Stock Yards, Chicago, Illinois, for the account of others and is not conducted by them

at any point outside said State of Illinois and is not interstate commerce. (Rec., pp. 8, 9, 18.) The Act of Congress under consideration herein is entitled, "An Act to regulate interstate and foreign commerce in live stock, live stock products, dairy products, poultry, poultry products and eggs and for other purposes," and purports, therefore, to derive its validity from Section 8, Article 1 of the Constitution of the United States.

Unless, therefore the appellants are engaged in interstate commerce, or by their individual operations in some way interfere with or exercise some appreciable and traceable influence directly upon interstate commerce so as to effect its volume or movement, the Packers and Stock Yards Act, 1921, is without validity as to them, for Article 10 of the Amendments to the Constitution of the United States provides:

> "The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively or to the people."

The definition of transactions in commerce contained in paragraph (b) of subparagraph 6 of Section 2 of Title I of the Packers and Stockyards Act, 1921, is, when applied to the business in which appellants are engaged, broader in its scope and terms than is the authority conferred upon Congress under the Commerce Clause of the Constitution to "regulate commerce with foreign nations and among the several states and with the Indian tribes."

Congress by definition cannot make that interstate commerce which is not in fact interstate commerce. To define the limits of the Congressional authority to regulate interstate commerce is not free from difficulty but rules for guidance have been clearly stated by this court in numerous decisions, of which the following are typical:

Martin v. *Hunter's Lessee,* 1 Wheaton, 326.
McCullough v. *Maryland,* 4 Wheaton, 405.

United States v. *Knight Co.* 156 U. S. 1.
Brown v. *Houston*, 114 U. S. 622.
Robbins v. *Taxing District*, 120 U. S. 489, 497.
Hooper v. *California*, 155 U. S. 648, 655.
Hopkins v. *United States*, 171 U. S. 578.
Anderson v. *United States*, 171 U. S. 604.
Browning v. *Waycross*, 233 U. S. 16.
General Railway Signal Co. v. *Virginia*, 246 U. S. 500.
Wagner v. *City of Covington*, 251 U. S. 95.
Hammer v. *Dagenhart*, 247 U. S. 251.
Coe v. *Errol*, 116 U. S. 517.
Pennsylvania R. R. Co. v. *Knight*, 192 U. S. 21.
Blumenstock v. *Curtis Publishing Co.* 252 U. S. 436.
Arkadelphia v. *St. Louis, etc. R. R. Co.* 249 U. S. 134.
Kidd v. *Pearson*, 128 U. S. 1, 20, 21, 22.
Ward Packing Co. v. *Federal Trade Commission*, 264 Fed. 330.
D. A. Winslow & Co. v. *Federal Trade Commission* (C. C. A. Fourth Circuit November 1, 1921, Federal Trade Commission Services, 2nd Edition, p. 637).

The business in which appellants are engaged was specifically considered by this court in the case of *Hopkins* v. *United States, supra,* and the court held that such business was not interstate in character. This case we believe to be *stare decisis.* In that case, which was a proceeding under the Sherman Act, the facts and the applicable language of the court were as follows:

The Kansas City Live Stock Exchange was an unincorporated voluntary association of men, doing business at its stockyards situated partly in Kansas City, Mis-

souri and partly across the line separating Kansas City, Missouri from Kansas City, Kansas. The business of its members was to receive individually consignments of cattle, hogs and other live stock from owners of the same, not only in the States of Missouri and Kansas, but also in other States and Territories, and to feed such stock, and to prepare it for the market, to dispose of the same, to receive the proceeds thereof from the purchasers, and to pay the owners their proportion of such proceeds after deducting charges, expenses and advances. The members were individually in the habit of soliciting consignments from the owners of such stock and of making them advances thereon. The rules of the association forbade members from buying live stock from a commission merchant in Kansas City not a member of the exchange, etc., etc.

The main question was this:

> Is the business or occupation that the defendants are engaged in interstate commerce in the sense of that word as it has been used and understood in the decisions of this court? Or is it a business which is an aid or facility to commerce, and which, if it affect interstate commerce at all, does so only in an indirect and incidental manner? (p. 587.)

The court said at page 588:

> "The business of defendants is primarily and substantially the buying and selling, in their character as commission merchants, at the stockyards in Kansas City, live stock which has been consigned to some of them for the purpose of sale, and the rendering of an account of the proceeds arising therefrom. The sale or purchase of live stock as commission merchants at Kansas City is the business done, and its character is not altered because the larger proportion of the purchases and sales may be of live stock sent into the State from other States or from the Territories. Where the stock came from or where it may ultimately go after a sale or purchase, procured through the services of one of the defendants at the

Kansas City stockyards is not the substantial factor in the case. The character of the business of defendants must in this case be determined by the facts occurring at that city.

If an owner of cattle in Nebraska accompanied them to Kansas City and there personally employed one of these defendants to sell the cattle at the stockyards for him on commission, could it be properly said that such defendant in conducting the sale for his principal was engaged in interstate commerce? Or that an agreement between himself and others not to render such services for less than a certain sum was a contract in restraint of interstate trade or commerce? We think not. On the contrary, we regard the services as collateral to such commerce and in the nature of a local aid or facility provided for the cattle owner towards the accomplishment of his purpose to sell them; and an agreement among those who render the services relating to the terms upon which they will render them is not a contract in restraint of interstate trade or commerce.

Is the true character of the transaction altered when the owner, instead of coming from Nebraska with his cattle, sends them by a common carrier consigned to one of the defendants at Kansas City with directions to sell the cattle and render him an account of the proceeds? The services rendered are the same in both instances, only in one case they are rendered under a verbal contract made at Kansas City personally, while in the other they are rendered under written instructions from the owner given in another State. This difference in the manner of making the contract for the services cannot alter the nature of the services themselves. If the person, under the circumstances stated, who makes a sale of the cattle for the owner by virtue of a personal employment at Kansas City is not engaged in interstate commerce when he makes such sale, we regard it as clear that he is not so engaged, although he has been employed by means of a written communication from the owner of the cattle in another State."

The court held that even the fact that the commission men in order to secure the business sent their agents into

other States; that they lent money to the cattle owners and took back mortgages upon the cattle as security for the loan; that they made advances of a portion of the purchase price of the cattle to be sold by means of the payment of drafts drawn upon them by the shippers of the cattle in another State at the time of the shipment, did not in any degree alter the nature of the services performed by the defendants.

At page 590 the Court says:

> "It is immaterial over how many States the defendants may themselves or by their agents travel in order to thereby secure the business. They do not purchase the cattle themselves; they do not transport them. They receive them at Kansas City, * * *. Thus everything at last centers at the market at Kansas City, and the charges are for services there, and there only, performed.
>
> The selling of an article at its destination, which has been sent from another State, while it may be regarded as an interstate sale and one which the importer was entitled to make, yet the services of the individual employed at the place where the article is sold are not so connected with the subject sold as to make them a portion of interstate commerce, * * *. Granting that the cattle themselves because coming from another state are articles of interstate commerce, yet it does not therefore follow that before their sale all persons performing services in any way connected with them are themselves engaged in that commerce, * * *.
>
> The commission agent in selling the cattle for their owner simply aids him in finding a market; but the facilities thus afforded the owner by the agent are not of such a nature as to thereby make that agent an individual engaged in interstate commerce, * * *.
>
> The charges of the agent on account of his services are nothing more than charges for aids or facilities furnished the owner whereby his object may be the more easily and readily accomplished. Charges for the transportation of cattle between different States are charges for doing something which is one of the forms of and which itself constitutes interstate

trade or commerce, while charges or commissions based upon services performed for the owner in effecting the sale of the cattle are not directly connected with, as forming part of, interstate commerce, although the cattle may have come from another state. Charges for services of this nature do not immediately touch or act upon nor do they directly affect the subject of the transportation. Indirectly and as an incident, they may enhance the cost to the owner of the cattle in finding a market, or they may add to the price paid by a purchaser, but they are not charges which are directly laid upon the article in the course of transportation, and which are charges upon the commerce itself; * * *.

Charges for facilities furnished have been held not a regulation of commerce, even when made for services rendered or as compensation for benefits conferred." (Citing *Sands* v. *Manistee River Improvement Co.* 123 U. S. 288; *Monongahela Navigation Co.* v. *U. S.* 148 U. S. 312, 329, 330; *Kentucky & Indiana Bridge Co.* v. *Louisville, etc. R. R.* 37 Fed. 567.)

"The State may levy a tax upon the earnings of a commission merchant which were realized out of the sales of property belonging to nonresidents, and such a tax is not one upon interstate commerce because it affects it only incidentally and remotely, although certainly." (*Ficklen* v. *Shelby County Taxing District*, 145 U. S. 1.)

At p. 595 the court used this language:

"The cattle owner has no constitutional right to the services of the commission agent to aid him in the sale of his cattle and the agent has the right to say upon what terms he will render them, and he has the equal right, so far as the act of Congress is concerned, to agree with others in his business not to render those services unless for a certain charge. The services are no part of the commerce in the cattle."

And at p. 597:

"Definitions as to what constitutes interstate commerce are not easily given so that they shall clearly define the full meaning of the term. We know from the cases decided in this court that it is a term of

very large significance. It comprehends as it is said, intercourse for the purposes of trade in any and all its forms, including transportation, purchase, sale, and exchange of commodities between the citizens of different States, and the power to regulate it embraces all the instruments by which such commerce may be conducted." (Citing *Welton* v. *Missouri*, 91 U. S. 275; *Mobile County* v. *Kimball*, 102 U. S. 691; *Gloucester Ferry* v. *Pennsylvania*, 114 U. S. 196; *Hooper* v. *California*, 155 U. S. 648, 653; *U. S.* v. *E. C. Knight Co.* 156 U. S. 1.)

"But in all the cases which have come to this court there is not one which has denied the distinction between a regulation which directly affects and embarrasses interstate trade or commerce, and one which is nothing more than a charge for a local facility provided for the transaction of such commerce."

The contention of the Government in the Hopkins case was that a combination and agreement existing among live stock commission merchants engaged in the same business as are appellants by which agreed rates of commission charges were collected for services performed by them constituted an illegal interference with interstate commerce in live stock. The court, as shown above, held that no such interference was effected and specifically held that the live stock business as conducted by the live stock commission men, defendants there, was not interstate commerce. In the case at bar there is no question of combination presented and since a combination and agreement among commission men in respect to their charges for services has been held not to be unlawful under the Sherman Act because of the fact that interstate commerce was not thereby affected or interfered with, with how much greater force can it be said that the business of a single individual live stock commission merchant is not an interstate business and that his charges for services performed in connection with the conduct

of his business are not a charge upon nor an obstruction to, or even directly related to, interstate commerce in live stock.

The Hopkins case was followed and quoted approvingly in *Blumenstock Advertising Agency* v. *Curtis Publishing Company*, 252 U. S. 436, which was a suit to recover treble damages under Section 7 of the Sherman Act. In holding that the business of an advertising agency in placing by contract with publishers advertisements for manufacturers and merchants in magazines, which are published and distributed throughout the United States, is not interstate commerce, although the circulation and distribution of the publications themselves be such, the court said in an opinion by Mr. Justice Day at page 442:

> "It may be conceded that the circulation and distribution of such publications throughout the country would amount to interstate commerce, but the circulation of these periodicals would not depend upon or have any direct relation to the advertising contracts which the plaintiff offered and the defendant refused to receive except upon the terms stated in the declaration. The advertising contracts did not involve any movement of goods or merchandise in interstate commerce, or any transmission of intelligence within such commerce."

So here the performance of the service of buying or selling live stock for the account of others upon an open public competitive market upon a fixed per head or per car charge for such service cannot be said to be a transaction in interstate commerce but is a thing apart and distinct therefrom. The character of service rendered or the commission charged therefor is in no way affected by the circumstances of the origin of the shipment either within or without the State of Illinois. At the time the live stock reaches the possession of appellants the transportation and carriage has ceased and does not again begin,

if ever, until after the services of appellants have been fully performed and their possession of the live stock parted with.

In the Blumenstock case, referring to the Hopkins case (p. 443), the court said:

> "We held in *Hopkins* v. *United States*, 171 U. S. 579, that the buying and selling of live stock in the stockyards of a city by members of the stock exchange was not interstate commerce, although most of the live stock was sent from other states."

The Hopkins case is also referred to approvingly in the case of *Swift & Company* v. *United States*, 196 U. S. 375, at page 397, as follows:

> "So again the line is distinct between this case and *Hopkins* v. *United States*, 171 U. S. 578. All that was decided there was that the local business of commission merchants was not commerce among the states, even if what the brokers were employed to sell was an object of such commerce. The brokers were not like the defendants before us, themselves the buyers and sellers. They only furnished certain facilities for the sales."

The business of appellants is, it seems to us, as distinctly separate from interestate commerce in live stock as is that of a broker who negotiates sales of merchandise between parties resident in different states, but has no control over the shipment of the commodities dealt in. Such a business has been held by the Supreme Court not to be interstate in character. The business of appellants is "a mere incident of commercial intercourse." If, instead of handling the live stock by taking actual possession of them, the appellants engaged merely in negotiating sales of live stock for customers or clients having no control whatever over deliveries thereof, their business under previous decisions of this court, it seems to us, would be clearly not within the description of interstate commerce. It would be a business

entirely local in character and not subject to congressional regulation. This view seems to us to be amply supported and applied in cases of:

Ficklen v. *Shelby County Taxing District*, 145 U. S. 1.

Williams v. *Fears*, 179 U. S. 270.

Ware & Leland v. *Mobile County*, 209 U. S. 405.

In the Ficklen case, *supra*, it was held that a broker engaged in negotiating sales between residents of Tennessee and nonresident merchants of goods situated in another state, was not engaged in interstate commerce.

In *Williams* v. *Fears*, *supra*, it was held that labor agents engaged within the State of Georgia in hiring persons to be employed outside the state were not engaged in interstate commerce.

In *Ware & Leland* v. *Mobile County*, *supra*, it was held that brokers taking orders and transmitting them to other states for the purchase and sale of grain or cotton upon speculation were not engaged in interstate commerce. In this case the court said on page 411:

> "While the general principles applied in these cases are not to be denied, there is a class of cases which hold that contracts between citizens of different states are not the subjects of interstate commerce, simply because they are negotiated between citizens of different states, or by the agent of a company in another state, where the contract itself is to be completed and carried out wholly within the borders of a state, although such contracts incidentally affect interstate trade."

The court further, on page 412, in that case quoted from *Hooper* v. *California*, 155 U. S. 648, as follows:

> "If the power to regulate interstate commerce applied to all the incidents to which said commerce might give rise and to all contracts which might be made in the course of its transaction, that power would embrace the entire sphere of mercantile activ-

ity in any way connected with trade between the states; and would exclude state control over many contracts purely domestic in their nature."

The business of appellants is not like that of solicitors who negotiate sales of goods in one state to be shipped from another state where such merchandise is in fact shipped from such latter state, because at the time when the live stock come into the possession of appellants, the transportation has ceased. The live stock are not shipped by the owners for delivery to any definite purchaser, nor is their shipment in interstate commerce induced by the appellants. Appellants merely perform with reference to such live stock after it has been shipped to the Union Stock Yards, which is the point of destination, the service of securing a purchaser therefor upon the open public market, or in the case of a purchase of live stock they merely perform the service of buying live stock upon the open market which has also reached its point of destination. After the performance of this service of purchase or sale, contact with the live stock ceases. Can it be fairly said that this contract of service between the commission man and his customers is anything more than a mere incident of commerce? In the light of the decisions of this court upholding the authority of a state to tax the business of brokers and others where their services are performed entirely within the state boundaries, can it be said that a tax by the State of Illinois upon the business of live stock commission merchants would not be upheld against the contention that such tax would be a burden upon interstate commerce? It has been said that the power to tax is the power to destroy, and if such a tax under the decisions of this court could be held to be a valid tax, then it follows that the appellants and all other live stock commission merchants engaged in the same line of business must be held not to be en-

gaged in interstate commerce within the meaning of the constitutional provision.

In the case of *State, ex rel Pennsylvania Railroad Company* v. *Knight*, 192 U. S. 21, it was held that a cab service maintained by the Pennsyvania Railroad Company to take passengers to and from its terminus in the City of New York, for which the charges are separate from those of other transportation and wholly for service within the State of New York, is not interstate commerce, although all persons using the cabs within the company's regulations are either going to, or going from, the State of New Jersey by the company's ferry. Such cab service is subject to the control of the State of New York and the Railroad Company is not exempt, on account of being engaged in interstate commerce from the state's privilege to tax while carrying on the business of running cabs for hire between points wholly within the state.

The court said, page 26:

> "It is true that a passenger over the Pennsylvania Railroad to the City of New York does not in one sense fully complete his journey when he reaches the ferry landing on the New York side, but only when he is delivered at his temporary or permanent stopping place in the city. Looking at it from this standpoint, the company's cab service is simply one element in a continuous interstate transportation, and as such would be excluded from state and be subject to national control. The state may not tax for the privilege of doing an interstate commerce business. *Atlantic & Pacific Telegraph Company* v. *Philadelphia*, 190 U. S. 160. On the other hand, the cab service is exclusively rendered within the limits of the city. It is contracted and paid for independently of any contract or payment for strictly interstate transportation. The party receiving it owes no legal duty of crossing the state line."

The court further said, p. 27:

"As we have seen, the cab service is rendered wholly within the state and has no contractual or necessary relation to interstate transportation. It is either preliminary or subsequent thereto. It is independently contracted for, and not necessarily connected therewith. But when service is wholly within a state, it is presumably subject to state control. The burden is on him who asserts that, though actually within, it is legally outside the state; and unless the interstate character is established, locality determines the question of jurisdiction. *Coe v. Errol*, 116 U. S. 517, though not in all respects similar, is very closely in point. In that case spruce logs had been drawn down from Wentworth's Location in New Hampshire, and placed in Clear Stream also in New Hampshire, to be from thence floated down the Androscoggin River to the State of Maine, there to be manufactured and sold. After they had thus been drawn down and placed in Clear Stream, a tax was imposed upon them by the State of New Hampshire. The validity of that tax was challenged on the ground that the logs were in process of transportation from Wentworth's Location in New Hampshire to the State of Maine. It was sustained by the Supreme Court of New Hampshire, and also by this court. In the course of the opinion Mr. Justice Bradley made these pertinent observations (p. 528):

'It is true, it was said in the case of *The Daniel Ball*, 10 Wall. 557, 565: "Whenever a commodity has begun to move as an article of trade from one state to another, commerce in that commodity between the states has commenced." But this movement does not begin until the articles have been shipped or started for transportation from the one state to the other. The carrying of them in carts or other vehicles, or even floating them, to the depot where the journey is to commence is no part of that journey. That is all preliminary work, performed for the purpose of putting the property in a state of preparation and readiness for transportation. Until actually launched on its way to another state, or committed to a common carrier for transportation to such state, its destination is not fixed and

certain. It may be sold or otherwise disposed of within the state, and never put in course of transportation out of the state. Carrying it from the farm, or the forest, to the depot, is only an interior movement of the property, entirely within the state, for the purpose, it is true, but only for the purpose, of putting it into a course of exportation; it is no part of the exportation itself. Until shipped or started on its final journey out of the state its exportation is a matter altogether *in fieri*, and not at all a fixed and certain thing.' (Citing cases.)

"As shown in the opinion from which we have just quoted, many things have more or less close relation to interstate commerce, which are not properly to be regarded as a part of it. If the cab which carries the passengers from the hotel to the ferry landing is engaged in interstate transportation, why is not the porter who carries the traveler's trunk from his room to the carriage also so engaged? If the cab service is interstate transportation, are the drivers of the cabs and the dealers who supply hay and grain for the horses also engaged in interstate commerce? And where will the limit be placed?"

Paraphrasing the language of Justice Brewer in the last case, if the appellants are engaged in interstate commerce merely because they perform a service in reference to, and come in contact with, live stock which may have been or perhaps may thereafter become subjects of interstate commerce, are also the men who unload the hay and corn into the troughs in the cattle pens engaged in interstate commerce, and will it also be said that the man who opens the gates leading into the various alleys and pens to permit of the live stock passing from one part of the stockyards to the other is likewise engaged in interstate commerce? And so the same question may be asked of the men who pour the water into the drinking troughs and who look after the sanitary conditions of the pens, as well as those who drive the cattle from one pen to another, and if these questions are to be answered in the affirmative, the query

of Justice Brewer comes naturally to mind, "Where will the limit be?" Obviously the line of distinction heretofore prevailing between state and national control over commerce will be forever obliterated.

The language of Chief Justice White in the *Employers' Liability Cases*, 207 U. S. 463, page 502, comes here to mind:

> "It remains only to consider the contention which we have previously quoted, that the act is constitutional, although it embraces subjects not within the power of Congress to regulate commerce, because one who engages in interstate commerce thereby submits all his business concerns to the regulating power of Congress. To state the proposition is to refute it. It assumes that because one engages in interstate commerce he thereby endows Congress with power not delegated to it by the Constitution, in other words, with the right to legislate concerning matters of purely state concern. It rests upon the conception that the Constitution destroyed that freedom of commerce which it was its purpose to preserve, since it treats the right to engage in interstate commerce as a privilege which cannot be availed of except upon such conditions as Congress may prescribe, even although the conditions would be otherwise beyond the power of Congress. It is apparent that if the contention were well founded it would extend the power of Congress to every conceivable subject, however inherently local, would obliterate all the limitations of power imposed by the Constitution, and would destroy the authority of the states as to all conceivable matters which from the beginning have been, and must continue to be, under their control so long as the Constitution endures."

In *Hammer* v. *Dagenhart*, 247 U. S. 251, in which was involved the question of the constitutional validity of an Act of Congress prohibiting the transportation in interstate commerce of goods which had been manufactured at a factory, which within thirty days prior to the removal of the goods had employed children under the

age of fourteen years, or where children between fourteen and sixteen years had been employed for a longer period per day than eight hours, or permitted to work more than six days in a week or after the hour of seven o'clock P. M. or before the hour of six o'clock A. M., the court in holding such Act of Congress beyond the scope of the Commerce Clause of the Constitution said (p. 272):

> "When the commerce begins is determined, not by the character of the commodity, nor by the intention of the owner to transfer it to another state for sale, nor by his preparation of it for transportation, but by its actual delivery to a common carrier for transportation, or the actual commencement of its transfer to another state. * * * If it were otherwise, all manufacture intended for interstate shipment would be brought under federal control to the practical exclusion of the authority of the states, a result certainly not contemplated by the framers of the Constitution when they vested in Congress the authority to regulate commerce among the states.
>
> The control by Congress over interstate commerce cannot authorize the exercise of authority not entrusted to it by the Constitution."

The power to regulate commerce among the states has never been construed to give authority to Congress to fix the prices at which commodities shipped in interstate commerce could be bought or sold. If such power were exerted, it would deny to the citizens of the various states the right to freely bargain and negotiate concerning the price of the fruits of their labors. It would enable the legislative department to destroy commerce, which would be contrary to the constitutional provision which confers power to regulate. Assuming that the owner of cattle shipped from some other state to the Union Stock Yards at Chicago, Illinois, for sale is engaged in interstate commerce, does it follow that Congress has the constitutional power to legislate as to the

price at which his live stock must be sold? And if not, how can the power be claimed for Congress as it has done in the Packers and Stockyards Act, 1921, to fix the price which should be paid by such shipper for services performed for him in selling his live stock by a live stock commission merchant whom he employes at the Chicago market for that purpose? And again, how can the power be claimed for Congress to fix the price which the commission man shall charge for his services in respect to live stock which he purchases or sells upon the market? To concede such power is to deprive the appellants of any individual right to appraise or value their own services.

In this connection we call attention to the language of Justice Brewer in his concurring opinion in the case of *Northern Securities Company* v. *United States,* 193 U. S. 197, at page 361:

> "Further, the general language of the act is also limited by the power which each individual has to manage his own property and determine the place and manner of its investment. Freedom of action in these respects is among the inalienable rights of every citizen."

In the same case Chief Justice White in his dissenting opinion quotes approvingly the language of Judge Jackson in the case of *In re Greene,* 52 Fed. Rep. 104, at page 384, as follows:

> "Neither can Congress regulate or prescribe the price or prices at which such property, or products thereof, shall be sold by the owner or owners, whether corporations or individuals."

Chief Justice White in the same dissenting opinion, on page 388, in commenting upon the decision of the court in the *Hopkins case,* 171 U. S. *supra,* said:

> "Proceeding, then, to consider the agreement, it was pointed out that the contention that the sale of cattle on the stockyards constituted interstate com-

merce was without merit. The distinction between interstate commerce as such and the power to make contracts and to buy and sell property was clearly stated, and because of that distinction the agreement was held not to be within the act of Congress, because that act could and did only relate to interstate commerce."

In the case of *Wilson* v. *New*, 243 U. S. 332, wherein was considered the validity of the act of Congress fixing the wages of railroad employees, such legislation was upheld because of the inability of employer and employees to agree among themselves, making it necessary in order to prevent a complete cessation of railroad operations and a consequent disastrous interference with interstate commerce that Congress supply a standard of wages to be observed for a limited time to enable the railroad companies and their employees to agree upon a wage. This legislation represented the exercise of the power to regulate interstate commerce through preventing an obstruction to and an interference therewith of calamitous proportions and the means employed, namely the fixing of wages, was incidental to the accomplishment of the real object to be attained, namely a regulation of interstate commerce through the prevention of an interference therewith.

It is undoubtedly true that in its power to regulate interstate commerce Congress has authority, complete in its character, to prevent all interference with such interstate commerce by persons regardless of whether or not such persons are or may be engaged themselves in carrying on interstate commerce. This is perfectly justifiable as a regulation of interstate commerce because, had Congress not the power and authority to prevent such interferences or obstructions regardless of the source from which they spring, and regardless of whether or not the per-

sons are themselves engaged in that character of commerce, the power to regulate interstate commerce would be ineffective. The authority of Congress to prevent interference with interstate commerce clearly arises out of its power to regulate interstate commerce, and certainly the latter power would be inherently weak and hopelessly inadequate if it did not extend to the wiping out of obstructions and interferences with interstate commerce from whatever source arising. Therefore, the validity of the Sherman Anti-Trust Act has been repeatedly upheld and under that act combinations and conspiracies by whomsoever entered into, having for their object an undue restraint or restriction of interstate commerce, have been condemned and their operations prohibited and restrained. The Packers' and Stockyards Act, 1921, however, does not deal with questions of combination or conspiracy in restraint of interstate commerce but is intended to regulate and control those at which it is aimed in the conduct of interstate commerce by them. *Therefore, only those who are actually themselves engaged in interstate commerce in live stock and the other products named in the title of the act come within its regulatory provisions.*

Those not engaged in interstate commerce, whether they deal in the things enumerated in the title of the Packers' and Stockyards Act, 1921, or not, are not subject to regulation and control under that act; but in the event of any combination or conspiracy existing among two or more of their number, the direct effect of which is to interfere with interestate commerce in those things mentioned in the act, or in respect to any other articles of interstate commerce, they may be reached by proceedings under the Sherman Law and possibly other acts of Congress. The control of their local business in so far as it may be made a subject of governmental control is in the states where their business is transacted.

The case of *Swift & Company* v. *United States,* 196 U. S. 375, was a proceeding *under the Sherman Act* to enjoin the operations of an alleged combination of meat packers in the purchase of live stock and the distribution of the fresh meats into which the same were converted by slaughter. The court, by Mr. Justice Holmes, said, page 394:

> "To sum up the bill more shortly, it charges a combination of a dominant proportion of the dealers in fresh meat throughout the United States not to bid against each other in the live stock markets of the different states, to bid up prices for a few days in order to induce the cattle men to send their stock to the stock yards, to fix prices at which they will sell, and to that end to restrict shipments of meat when necessary, to establish a uniform rule of credit to dealers and to keep a black list, to make uniform and improper charges for cartage, and finally, to get less than lawful rates from the railroads to the exclusion of competitors."

It will be noted from the foregoing statement of the court that the actions of the defendants were calculated and intended to induce the shipment of live stock to the market where the defendants then have an opportunity to purchase the same. After purchase, such live stock are by the defendants converted into fresh meats by slaughter and shipped by them to various states of the United States for sale, and the combination alleged was one by which the defendants refrained from bidding against one another at the sale of live stock and agreed among themselves as to the price at which fresh meats should be sold and, to accomplish such purpose, restricted their shipments of meats when necessary.

The court further said on page 398:

> "When cattle are sent for sale from a place in one state, with the expectation that they will end their transit, after purchase, in another, and when in effect they do so, with only the interruption nec-

> essary to find a purchaser at the stockyards, and when this is a typical, constantly recurring course, the current thus existing is a current of commerce among the states, and the purchase of the cattle is a part and incident of such commerce. *What we say is true at least of such a purchase by residents in another state from that of the seller and of the cattle.*" (Italics ours.)

The definition of commerce contained in the Packers' and Stockyards Act, 1921, is presumably based upon the foregoing quoted language from the opinion in the *Swift* case. The application of such language, however, in the Packers' and Stockyards Act, 1921, in our judgment distorts it from its true meaning. The quoted language unmistakably is a description of the commerce in which the defendants in that case were engaged and as applied to them it is undeniably true that such commerce would be interstate commerce for the facts show that the defendants in the first instance induced the shipment of live stock to the market with the intent on their part to purchase the same and, after purchase, to convert such live stock into fresh meat and to distribute and sell it throughout the states of the Union. Therefore, any combination or conspiracy existing between the defendants engaged in that business would necessarily constitute a restraint upon the free and uninterrupted flow of interstate commerce. This case is not a holding that all of the business transacted at the stockyards is of an interstate character, but is at most a holding that the defendants in that case were themselves engaged in interstate commerce and not a combination to restrain such commerce. This thought is borne out by the language of the court in discussing the *Hopkins* case on page 397:

> "The brokers were not like the defendants before us, themselves the buyers and sellers. They only furnished certain facilities for the sales."

There is in all of the decisions of this court no departure so far as the questions in the pending case are concerned from the doctrine announced in the *Hopkins* case, 171 U. S. *supra,* and we respectfully conclude this branch of the argument with the suggestion that the *Hopkins* case is decisive of the proposition that the appellants are not engaged in interstate commerce and are therefore not within the regulatory power of Congress.

DISCUSSION OF THE OPINION OF THE DISTRICT COURT.

Without undertaking to distinguish the case at bar from the Hopkins case, *supra,* the District Court in its opinion denying appellants' application for an interlocutory injunction proceeds upon the theory that because a certain portion of the Union Stock Yards at Chicago is used as a railroad terminal, therefore the whole stockyard is an instrumentality of interstate commerce and everybody engaged in business or employed in any part of said stockyards is engaged in, or an instrumentality of, interstate commerce.

We think the court has failed to distinguish between the Union Stock Yards as a *terminal* and the Union Stock Yards as a *public market.* The Union Stock Yards covers a great many acres and combines within its limits a railroad terminal and a public market. Those persons whose duties connect them with the terminal may be engaged in, or instrumentalities of, interstate commerce. The public market, however, is in another part of the yard and is as distinct from the terminal as it would be if it were located in another part of the city. The cattle undoubtedly pass through the terminal, but after the relation of the carrier to such live stock has terminated by delivery thereof to the consignee at the terminal, and after the cattle are removed therefrom to such public market, they are intermingled with, and

become a part of the general property of the state and lose their character as articles of interstate commerce.

It cannot be that every person who comes in contact with live stock which is sold upon the public market, which live stock may or may not have been, or become, an article of interstate commerce, is, *ipso facto*, engaged in or an instrumentality of interstate commerce.

We do not think that the safety appliance or employers' liability legislation, or other legislation referred to in the opinion, furnishes any analogy for this case. The matters covered by such legislation were more or less directly or indirectly related to interstate transportation or the handling of property moving in interstate commerce. Appellants' services and activities as live stock commission men relate to the property after the interstate shipment has terminated, and, therefore, their services are not even indirectly connected with anything that is the subject of interstate commerce.

Their services are in no way connected with the transportation or delivery of live stock at the terminal, and, therefore, they are not even indirectly instrumentalities of the interstate shipment.

We have endeavored to point out that the appellants' business is not conducted in the live stock terminal, but if it were, it would by no means follow that it would be a proper subject for congressional regulation. It is a matter of public knowledge that many businesses are conducted in passenger terminals, notably the great terminal at Forty-second street in New York City which houses not only a passenger depot and railroad offices, but restaurants, drug stores, telegraph offices, barber shops, haberdashers, book and stationery stores, and boot-black stands. Can it be said that each and all of these industries, because located in this passenger ter-

minal and serving persons who may have completed, or be about to undertake, an interstate journey, are, therefore, instrumentalities of interstate commerce subject to congressional legislation?

III.

THE ACT VIOLATES THE FIFTH AMENDMENT TO THE CONSTITUTION BECAUSE OF THE ARBITRARY CLASSIFICATION OF STOCKYARDS SUBJECT TO THE ACT.

Title III of the Packers' and Stockyards Act, 1921, in Section 302, paragraph (a), contains this language:

> "This title shall not apply to a stockyard of which the area normally available for handling live stock, exclusive of runs, alleys, or passageways, is less than 20,000 square feet."

An arbitrary classification of stockyards is thus made which is in violation of the Fifth Amendment to the Constitution.

The Fourteenth Amendment to the Federal Constitution is a limitation upon the rights of any state to deprive any person of life, liberty or property without due process of law and prohibits any state from denying any person within its jurisdiction equal protection of the laws. The Fifth Amendment places the same limitations upon the co-ordinate branches of the national government that the Fourteenth Amendment places upon the state governments. "Due process of law" has the same meaning when applied to the acts of Congress under the Fifth Amendment as it has under the Fourteenth Amendment when applied to the acts of the states.

In speaking of the "due process" clause of the 5th amendment this court in *Murray's Lessee* v. *Hoboken Land & Improvement Company*, 18 How. 272, 276, said:

> "The article is a restraint on the legislative as

well as on the executive and judicial powers of the Government and cannot be so construed as to leave Congress free to make any process 'due process of law' by its mere will."

In *Giozza* v. *Tiernan*, 148 U. S. 657, this court again said:

"Due process of law within the meaning of the amendment is secured if the laws operate on all alike and do not subject the individual to an arbitrary exercise of the powers of government."

In epitomizing the decisions of this court it is stated in Willoughby on the Constitution, page 874:

"One of the requirements of due process of law as stated by the Supreme Court is that the laws 'operate on all alike' and do not subject the individual to an arbitrary exercise of the powers of government."

See also—

Hurtado v. *California*, 110 U. S. 516.
United States v. *Armstrong*, 265 Fed. 683.
Cotting v. *Kansas City Stock Yards Company*, 183 U. S. 79.

In the latter case, in which the statute of the State of Kansas defining what shall constitute a public stockyards and the duties of the persons operating the same in such a way as to apply only to the Kansas City Stock Yards Company, and not to other companies or corporations engaged in like business in Kansas, was held to be in violation of the Fourteenth Amendment, the court said on page 112:

"There can be no pretence that a stockyard which receives 99 head of cattle per day a year is not doing precisely the same business as one receiving 101 head of cattle per day each year. It is the same business in all its essential elements, and the only difference is that one does more business than the other. But the receipt of an extra two head of cattle per day does not change the character of the

business. If once the door is opened to the affirmance of the proposition that a state may regulate one who does much business, while not regulating another who does the same but less business, then all significance in the guarantee of the equal protection of the laws is lost, and the door is opened to inequality of legislation which Mr. Justice Catron referred to in the quotation above made. This statute is not simply legislation which in its indirect results affects different individuals or corporations differently, nor with those in which a classification is based upon inherent differences in the character of the business, but is a positive and direct discrimination between persons engaged in the same class of business and based simply upon the quantity of business which each may do. If such legislation does not deny the equal protection of the laws, we are unable to perceive what legislation would."

IV.

THE ACT VIOLATES THE FOURTH AND FIFTH AMENDMENTS TO THE CONSTITUTION IN AUTHORIZING UNREASONABLE SEARCHES AND SEIZURES OF APPELLANTS' PAPERS AND IN COMPELLING APPELLANTS TO FURNISH EVIDENCE AGAINST THEMSELVES.

Titles III and IV of said act, considered in connection with the broad authority conferred upon the Secretary of Agriculture to eke out the statute with administrative regulations, the visitorial powers conferred by the act upon the Secretary, and the regulations which the Secretary has notified the appellants of his intention to adopt, invade the rights of the plaintiffs "to be secure in their persons, houses, papers and effects against unreasonable searches and seizures" contrary to Article IV of the Amendments to the Constitution.

Section 306, Title III, relates to the publication of rates and charges of commission men and provides that they shall be just and reasonable and nondiscriminatory, and the Secretary is authorized, upon complaint,

or upon his own initiative, to suspend and set aside any such rate or charge which he deems to be unjust or unreasonable, or discriminatory and prescribe a new rate or charge in lieu thereof. As part of the machinery for enforcing this provision of the act, the commission man is required to file schedules of such rates and charges with the Secretary. The Secretary is given supervision of the preparation and form thereof. Whoever fails to comply with the provisions of this section *or of any regulation or order of the Secretary thereunder* is liable to a fine of five hundred dollars for each offense and twenty-five dollars a day for each day that it continues, which penalties are supplemented by a provision to the effect that whoever willfully fails to comply with *any regulation or order of the Secretary* shall be fined not more than $1,000 or imprisoned not more than one year, or both. (Section 306 (g) (h).)

The commission man is also liable to a civil action for any failure *to obey any order of the Secretary* by any person injured thereby. (Section 309 (a).)

It is also provided that every commission man shall keep such accounts, records and memoranda as fully and correctly disclose all transactions involved in his business and as the Secretary may prescribe under pain of a fine of $5,000, or imprisonment for not more than three years, or both, for failure so to do. (Section 401, Title IV.)

It is also provided that "whenever the Secretary finds that the accounts, records and memoranda" kept by the commission man do not fully disclose all such transactions (which implies the right to enter, examine and search), the Secretary may prescribe other forms of account, record and memoranda conforming to his own ideas. In other words, every commission man is compelled upon pain of three years' possible imprisonment

and a possible fine of $5,000 to keep any elaborate system of accounts which the Secretary or his subordinates may prescribe, no matter how expensive or burdensome they may become.

Section 402 of Title IV of said act provides that the Secretary in person, or by such agents as he may designate, may prosecute any inquiry necessary to his duties under this act in any part of the United States; and Section 407 provides that the Secretary "may make such rules, regulations and orders as may be necessary to carry out the provision of this act."

The Secretary has construed the sections quoted as conferring very wide inquisitorial powers upon him and has proposed and threatened to put into effect certain regulations, of which the following are examples:

> "Each stockyard owner and registrant shall during ordinary business hours permit any representative of the Packers and Stockyards Administration designated by the officer in charge thereof to enter his place of business and inspect any or all property in his possession or control and all records pertaining to his business. Any necessary facilities for such inspection shall be extended to such representative by the stockyard owner or registrant, his agents and employees. Such representative shall be the Secretary's duly authorized agent for the purposes of these regulations." (Rec., 31.)

Not only is the commission man subjected to this visitation but he is put to the expense of furnishing the representative of the Secretary with any necessary facilities for any inspection which the representative may care to make.

Other of said regulations are equally obnoxious to the Fourth Amendment; for instance, Regulation 8, which requires the commission man to furnish the Stockyards Administration with copies of all contracts, and Regulation 12, prohibiting the commission man from

destroying any book, record, document or paper without the consent of the Stockyards Administration, which implies an obligation to submit all records, documents or papers to the Stockyards Administration for their inspection. (Rec., 32.) We submit that these provisions of the statute and regulations of the Secretary go far beyond the reasonable requirements of a lawful visitorial power. The commission man has no protection whatever, if this statute is sustained against arbitrary incursions by irresponsible agents of the Department of Agriculture. Of course, in the nature of things, it will be impossible for the Secretary to conduct such investigations in person; in fact, he is expressly authorized by Section 402 of Title IV to delegate his authority to subordinate agents, selected for the purpose. It follows, therefore, that this vast power will be delegated to some bureau acting through a subordinate clothed with all of the authority of the Secretary, but lacking his discretion, authorized by the regulations to pry into all of the private affairs of the individual plaintiffs, whether pertinent or not to a legitimate inquiry in aid of any function conferred upon the Secretary under the act, of the necessity for which such subordinate is to be the sole judge. Such investigation is governed by no standard, rule or law, except the arbitrary whim of the investigator. The citizen is protected by no judicial safeguard or form of procedure, but the investigator may enter at all times, provided it is during reasonable business hours, without writ, process or hindrance, and with no limit set to the scope or extent of his investigations and compel the citizen, upon pain of fine and imprisonment, to submit every detail of his private business affairs to the scrutiny of the investigator. The citizen has no remedy for this infraction of his privacy and no redress for the violation of the sanctity of his person, premises or papers.

The Fourth Amendment provides that the privacy of the citizen shall not be invaded or his property be seized by any person whatsoever, though acting under color of executive authority, except by some process which conforms to the requirements of the Fourth Amendment. The Fourth Amendment precludes the possibility of any search except such as is conducted under a search warrant supported by an oath as to the facts showing probable cause. It may be that some other form of procedure may be substituted by legislative action which will satisfy the requirements of the Fourth Amendment, but whatever it is, it must contain such process of law as will protect the citizen from the arbitrary encroachments of the executive.

This court said in *Boyd* v. *United States*, 116 U. S. 616, quoting the language of Lord Camden:

> "'Papers are the owner's goods and chattels; they are his dearest property; and are so far from enduring a seizure that they will hardly bear an inspection; and though the eye cannot by the laws of England be guilty of a trespass, yet, where private papers are removed and carried away, the secret nature of those goods will be an aggravation of the trespass, and demand more considerable damages in that respect. Where is the written law that gives any magistrate such a power? I can safely answer, there is none; and therefore, it is too much for us, without such authority, to pronounce a practice legal which would be subversive of all the comforts of society.'"

See, also, Cooley on Constitutional Limitations, p. 424.

We beg to call the court's attention to the language of the Circuit Court of Appeals for the Seventh Circuit in *Veeder* v. *United States*, 252 Fed. Rep. 414, 418:

> "A brief statement of the applicable principles of law will suffice, for they are so well settled, so obvious from a reading of the constitutional and statutory provisions in question, so founded in the

instinctive sense of natural justice, that no elaboration of the grounds therefor is needed.

One's person and property must be entitled, in an orderly democracy, to protection against both mob hysteria and the oppression of agents whom the people have chosen to represent them in the administration of laws which are required by the Constitution to operate upon all persons alike.

One's home and place of business are not to be invaded forcibly and searched by the curious and suspicious; not even by a disinterested officer of the law, unless he is armed with a search warrant."

A form of the requisite process of law is found in the Act to Regulate Commerce, Section 12 (as it stood prior to the amendment of February 28, 1920), under which the Interstate Commerce Commission is given broad inquisitorial powers. Nevertheless, this court held in *Ellis* v. *The Interstate Commerce Commission,* 237 U. S. 434, 445, that the Commission had no authority under this section to conduct a mere "fishing expedition," citing *In re Pacific Railway Commission,* 32 Fed. Rep. 241; *Interstate Commerce Commission* v. *Brimson,* 154 U. S. 447, 478, 479; *Harem* v. *Interstate Commerce Commission,* 211 U. S. 407.

Cases upon the subject requiring particularity in the description of the property to be seized, as well as the premises to be searched, and requiring a direct showing of probable cause, as prerequisite to a valid search warrant, show the sanctity of the citizen's liberties and preclude the idea that such a search can be conducted even by the executive in times of peace without warrant or judicial process or other proceeding which approximates the American idea of due process of law.

No immunity is conferred by the Packers and Stockyards Act, 1921, and therefore, evidence secured by the Secretary and his subordinates under the statutes and regulations of the Secretary might be used against the

commission man as a basis for the recovery of the penalties imposed by the act or for a prosecution to enforce the criminal provisions thereof. Such a search, even without seizure, would subject the commission man to the danger of prosecution and would in effect compel him to give evidence against himself if the statute applies to him, and is otherwise enforcible, contrary to the provisions of the Fifth Article of the Amendments to the Constitution. This, we think, brings the statute clearly within the condemnation expressed by this court in *Boyd* v. *United States,* 116 U. S. 616.

In reaffirmance of the *Boyd* case this court said in *Hale* v. *Henkel,* 201 U. S. 43, 71:

> "We held (page 622) 'that a compulsory production of a man's private papers to establish a criminal charge against him or to forfeit his property is within the scope of the Fourth Amendment to the Constitution in all cases in which a search and seizure would be'; and that the order in question was an unreasonable search and seizure within that Amendment."

In Conclusion.

We respectfully submit that the appellants are not engaged in interstate commerce; that they are not instrumentalities of such commerce; that their business does not relate to property which is the subject of interstate commerce and that they are not in a position to impose any burden upon or obstruction to the free flow of such commerce. The Packers & Stockyards Act, 1921, therefore, has no application to them. It may be sustained as a valid and constitutional enactment and at the same time appellants be entitled to an injunction against the Secretary of Agriculture and the United States Attorney for the Northern District of Illinois to restrain them from attempting to enforce the statute as

to appellants. They are confronted with such interference with their business by the defendants, the danger is imminent, the consequences will be disastrous, the injury resulting from the continued interference of the Secretary and the threatened prosecutions by the United States Attorney irreparable, and therefore regardless of the constitutionality of the statute we believe that they are entitled to injunctive relief.

But in view of the declared purpose of Congress appearing upon the face of the Act, and particularly in Section 301 of Title III thereof, to bring the business of appellants within the provisions of the Act and to legislate in respect of a matter which is not interstate commerce solely by virtue of the power conferred upon Congress by the commerce clause of the Constitution, we submit that Titles III and IV of the Act are unconstitutional and that the enforcement thereof by the defendants should be enjoined.

Appellants pray therefore that the order and decree of the District Court of the United States for the Northern District of Illinois may be reversed with directions to grant an interlocutory injunction against the Secretary of Agriculture and a temporary injunction against the United States Attorney as prayed in the bill of complaint.

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Counsel for Appellants.

APPENDIX.

An Act To regulate interstate and foreign commerce in live stock, live-stock products, dairy products, poultry, poultry products, and eggs, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

TITLE I.—DEFINITIONS.

This Act may be cited as the "Packers and Stockyards Act, 1921."

SEC. 2. (a) When used in this Act—

(1) The term "person" includes individuals, partnerships, corporations, and associations;

(2) The term "Secretary" means the Secretary of Agriculture;

(3) The term "meat food products" means all products and by-products of the slaughtering and meat-packing industry—if edible;

(4) The term "live stock" means cattle, sheep, swine, horses, mules, or goats—whether live or dead;

(5) The term "live-stock products" means all products and by-products (other than meats and meat food products) of the slaughtering and meat-packing industry derived in whole or in part from live stock; and

(6) The term "commerce" means commerce between any State, Territory, or possession, or the District of Columbia, and any place outside thereof; or between points within the same State, Territory, or possession,

or the District of Columbia, but through any place outside thereof; or within any Territory or possession, or the District of Columbia.

(b) For the purpose of this Act (but not in any wise limiting the foregoing definition) a transaction in respect to any article shall be considered to be in commerce if such article is part of that current of commerce usual in the live-stock and meat-packing industries, whereby live stock, meats, meat food products, live-stock products, dairy products, poultry, poultry products, or eggs, are sent from one State with the expectation that they will end their transit, after purchase, in another, including, in addition to cases within the above general description, all cases where purchase or sale is either for shipment to another State, or for slaughter of live stock within the State and the shipment outside the State of the products resulting from such slaughter. Articles normally in such current of commerce shall not be considered out of such current through resort being had to any means or device intended to remove transactions in respect thereto from the provisions of this Act. For the purpose of this paragraph the word "State" includes Territory, the District of Columbia, possession of the United States, and foreign nation.

TITLE II.—PACKERS.

SEC. 201. When used in this Act—

The term "packer" means any person engaged in the business (a) of buying live stock in commerce for purposes of slaughter, or (b) of manufacturing or preparing meats or meat food products for sale or shipment in commerce, or (c) of manufacturing or preparing live-stock products for sale or shipment in commerce, or (d) of marketing meats, meat food products, live-stock products, dairy products, poultry, poultry products, or

eggs, in commerce; but no person engaged in such business of manufacturing or preparing live-stock products or in such marketing business shall be considered a packer unless—

(1) Such person is also engaged in any business referred to in clause (a) or (b) above, or unless

(2) Such person owns or controls, directly or indirectly, through stock ownership or control or otherwise, by himself or through his agents, servants, or employees, any interest in any business referred to in clause (a) or (b) above, or unless

(3) Any interest in such business of manufacturing or preparing live-stock products, or in such marketing business is owned or controlled, directly or indirectly, through stock ownership or control or otherwise, by himself or through his agents, servants, or employees, by any person engaged in any business referred to in clause (a) or (b) above, or unless

(4) Any person or persons jointly or severally, directly or indirectly, through stock ownership or control or otherwise, by themselves or through their agents, servants, or employees, own or control in the aggregate 20 per centum or more of the voting power or control in such business of manufacturing or preparing live-stock products, or in such marketing business and also 20 per centum or more of such power or control in any business referred to in clause (a) or (b) above.

SEC. 202. It shall be unlawful for any packer to:

(a) Engage in or use any unfair, unjustly discriminatory, or deceptive practice or device in commerce; or

(b) Make or give, in commerce, any undue or unreasonable preference or advantage to any particular person or locality in any respect whatsoever, or subject, in commerce, any particular person or locality to any undue or unreasonable prejudice or disadvantage in any respect whatsoever; or

(c) Sell or otherwise transfer to or for any other packer, or buy or otherwise receive from or for any other packer, any article for the purpose or with the effect of apportioning the supply in commerce between any such packers, if such apportionment has the tendency or effect of restraining commerce or of creating a monopoly in commerce; or

(d) Sell or otherwise transfer to or for any other person, or buy or otherwise receive from or for any other person, any article for the purpose or with the effect of manipulating or controlling prices in commerce, or of creating a monopoly in the acquisition of, buying, selling, or dealing in, any article in commerce, or of restraining commerce; or

(e) Engage in any course of business or do any act for the purpose or with the effect of manipulating or controlling prices in commerce, or of creating a monopoly in the acquisition of, buying, selling, or dealing in, any article in commerce, or of restraining commerce; or

(f) Conspire, combine, agree, or arrange with any other person (1) to apportion territory for carrying on business in commerce, or (2) to apportion purchases or sales of any article in commerce, or (3) to manipulate or control prices in commerce; or

(g) Conspire, combine, agree or arrange with any other person to do, or aid or abet the doing of, any act made unlawful by subdivision (a), (b), (c), (d), or (e).

SEC. 203. (a) Whenever the Secretary has reason to believe that any packer has violated or is violating any provision of this title, he shall cause a complaint in writing to be served upon the packer, stating his charges in that respect, and requiring the packer to attend and testify at a hearing at a time and place designated therein, at least thirty days after the service of such complaint; and at such time and place there shall be afforded

the packer a reasonable opportunity to be informed as to the evidence introduced against him (including the right of cross-examination), and to be heard in person or by counsel and through witnesses, under such regulations as the Secretary may prescribe. Any person for good cause shown may on application be allowed by the Secretary to intervene in such proceeding, and appear in person or by counsel. At any time prior to the close of the hearing the Secretary may amend the complaint; but in case of any amendment adding new charges the hearing shall, on the request of the packer, be adjourned for a period not exceeding fifteen days.

(b) If, after such hearing, the Secretary finds that the packer has violated or is violating any provisions of this title covered by the charges, he shall make a report in writing in which he shall state his findings as to the facts, and shall issue and cause to be served on the packer an order requiring such packer to cease and desist from continuing such violation. The testimony taken at the hearing shall be reduced to writing and filed in the records of the Department of Agriculture.

(c) Until a transcript of the record in such hearing has been filed in a circuit court of appeals of the United States, as provided in section 204, the Secretary at any time, upon such notice and in such manner as he deems proper, but only after reasonable opportunity to the packer to be heard, may amend or set aside the report or order, in whole or in part.

(d) Complaints, orders, and other processes of the Secretary under this section may be served in the same manner as provided in section 5 of the Act entitled "An Act to create a Federal Trade Commission, to define its powers and duties, and for other purposes," approved September 26, 1914.

SEC. 204 (a) An order made under section 203 shall

be final and conclusive unless within thirty days after service the packer appeals to the circuit court of appeals for the circuit in which he has his principal place of business, by filing with the clerk of such court a written petition praying that the Secretary's order be set aside or modified in the manner stated in the petition, together with a bond in such sum as the court may determine, conditioned that such packer will pay the costs of the proceedings if the court so directs.

(b) The clerk of the court shall immediately cause a copy of the petition to be delivered to the Secretary, and the Secretary shall forthwith prepare, certify, and file in the court a full and accurate transcript of the record in such proceedings, including the complaint, the evidence, and the report and order. If before such transcript is filed the Secretary amends or sets aside his report or order, in whole or in part, the petitioner may amend the petition within such time as the court may determine, on notice to the Secretary.

(c) At any time after such transcript is filed the court, on application of the Secretary, may issue a temporary injunction restraining, to the extent it deems proper, the packer and his officers, directors, agents, and employees, from violating any of the provisions of the order pending the final determination of the appeal.

(d) The evidence so taken or admitted, duly certified and filed as aforesaid as a part of the record, shall be considered by the court as the evidence in the case. The proceedings in such cases in the circuit court of appeals shall be made a preferred cause and shall be expedited in every way.

(e) The court may affirm, modify, or set aside the order of the Secretary.

(f) If the court determines that the just and proper disposition of the case requires the taking of additional

evidence, the court shall order the hearing to be reopened for the taking of such evidence, in such manner and upon such terms and conditions as the court may deem proper. The Secretary may modify his findings as to the facts, or make new findings, by reason of the additional evidence so taken, and he shall file such modified or new findings and his recommendations, if any, for the modification or setting aside of his order, with the return of such additional evidence.

(g) If the circuit court of appeals affirms or modifies the order of the Secretary, its decree shall operate as an injunction to restrain the packer, and his officers, directors, agents, and employees from violating the provisions of such order or such order as modified.

(h) The circuit court of appeals shall have exclusive jurisdiction to review, and to affirm, set aside, or modify, such orders of the Secretary, and the decree of such court shall be final except that it shall be subject to review by the Supreme Court of the United States upon certiorari, as provided in section 240 of the Judicial Code, if such writ is duly applied for within sixty days after entry of the decree. The issue of such writ shall not operate as a stay of the decree of the circuit court of appeals, in so far as such decree operates as an injunction, unless so ordered by the Supreme Court.

(i) For the purposes of this title the term "circuit court of appeals," in case the principal place of business of the packer is in the District of Columbia, means the Court of Appeals of the District of Columbia.

SEC. 205. Any packer, or any officer, director, agent, or employee of a packer, who fails to obey any order of the Secretary issued under the provisions of section 203, or such order as modified—

(1) After the expiration of the time allowed for filing a petition in the circuit court of appeals to set aside

or modify such order, if no such petition has been filed within such time; or

(2) After the expiration of the time allowed for applying for a writ of certiorari, if such order, or such order as modified, has been sustained by the circuit court of appeals and no such writ has been applied for within such time; or

(3) After such order, or such order as modified, has been sustained by the courts as provided in section 204: shall on conviction be fined not less than $500 nor more than $10,000, or imprisoned for not less than six months nor more than five years, or both. Each day during which such failure continues shall be deemed a separate offense.

TITLE III.—STOCKYARDS.

SEC. 301. When used in this Act—

(a) The term "stockyard owner" means any person engaged in the business of conducting or operating a stockyard;

(b) The term "stockyard services" means services or facilities furnished at a stockyard in connection with the receiving, buying or selling on a commission basis or otherwise, marketing, feeding, watering, holding, delivery, shipment, weighing, or handling, in commerce, of live stock;

(c) The term "market agency" means any person engaged in the business of (1) buying or selling in commerce live stock at a stockyard on a commission basis or (2) furnishing stockyard services; and

(d) The term "dealer" means any person, not a market agency, engaged in the business of buying or selling in commerce live stock at a stockyard, either on his own account or as the employee or agent of the vendor or purchaser.

SEC. 302. (a) When used in this title the term "stockyard" means any place, establishment, or facility commonly known as stockyards, conducted or operated for compensation or profit as a public market, consisting of pens, or other inclosures, and their appurtenances, in which live cattle, sheep, swine, horses, mules, or goats are received, held, or kept for sale or shipment in commerce. This title shall not apply to a stockyard of which the area normally available for handling live stock, exclusive of runs, alleys, or passage ways, is less than twenty thousand square feet.

(b) The Secretary shall from time to time ascertain, after such inquiry as he deems necessary, the stockyards which come within the foregoing definition, and shall give notice thereof to the stockyard owners concerned, and give public notice thereof by posting copies of such notice in the stockyard, and in such other manner as he may determine. After the giving of such notice to the stockyard owner and to the public, the stockyard shall remain subject to the provisions of this title until like notice is given by the Secretary that such stockyard no longer comes within the foregoing definition.

SEC. 303. After the expiration of thirty days after the Secretary has given public notice that any stockyard is within the definition of section 302, by posting copies of such notice in the stockyard, no person shall carry on the business of a market agency or dealer at such stockyard unless he has registered with the Secretary under such rules and regulations as the Secretary may prescribe, his name and address, the character of business in which he is engaged and the kinds of stockyard services, if any, which he furnishes at such stockyard. Whoever violates the provisions of this section shall be liable to a penalty of not more than $500 for each such offense and not more than $25 for each day it continues,

which shall accrue to the United States and may be recovered in a civil action brought by the United States.

SEC. 304. It shall be the duty of every stockyard owner and market agency to furnish upon reasonable request, without discrimination, reasonable stockyard services at such stockyard.

SEC. 305. All rates or charges made for any stockyard services furnished at a stockyard by a stockyard owner or market agency shall be just, reasonable, and nondiscriminatory, and any unjust, unreasonable, or discriminatory rate or charge is prohibited and declared to be unlawful.

SEC. 306. (a) Within sixty days after the Secretary has given public notice that a stockyard is within the definition of section 302, by posting copies of such notice in the stockyard, the stockyard owner and every market agency at such stockyard shall file with the Secretary, and print and keep open to public inspection at the stockyard, schedules showing all rates and charges for the stockyard services furnished by such person at such stockyard. If a market agency commences business at the stockyard after the expiration of such sixty days such schedules must be filed before any stockyard services are furnished.

(b) Such schedules shall plainly state all such rates and charges in such detail as the Secretary may require, and shall also state any rules or regulations which in any manner change, affect, or determine any part or the aggregate of such rates or charges, or the value of the stockyard services furnished. The Secretary may determine and prescribe the form and manner in which such schedules shall be prepared, arranged, and posted, and may from time to time make such changes in respect thereto as may be found expedient.

(c) No changes shall be made in the rates or charges

so filed and published, except after ten days' notice to the Secretary and to the public filed and published as aforesaid, which shall plainly state the changes proposed to be made and the time such changes will go into effect; but the Secretary may, for good cause shown, allow changes on less than ten days' notice, or modify the requirements of this section in respect to publishing, posting, and filing of schedules, either in particular instances or by a general order applicable to special or peculiar circumstances or conditions.

(d) The Secretary may reject and refuse to file any schedule tendered for filing which does not provide and give lawful notice of its effective date, and any schedule so rejected by the Secretary shall be void and its use shall be unlawful.

(e) Whenever there is filed with the Secretary any schedule, stating a new rate or charge, or a new regulation or practice affecting any rate or charge, the Secretary may either upon complaint or upon his own initiative without complaint, at once, and if he so orders without answer or other formal pleading by the person filing such schedule, but upon reasonable notice, enter upon a hearing concerning the lawfulness of such rate, charge, regulation, or practice, and pending such hearing and decision thereon the Secretary, upon filing with such schedule and delivering to the person filing it a statement in writing of his reasons for such suspension, may suspend the operation of such schedule and defer the use of such rate, charge, regulation, or practice, but not for a longer period than thirty days beyond the time when it would otherwise go into effect; and after full hearing, whether completed before or after the rate, charge, regulation, or practice goes into effect, the Secretary may make such order with reference thereto as would be proper in a proceeding initiated after it had

become effective. If any such hearing can not be concluded within the period of suspension the Secretary may extend the time of suspension for a further period not exceeding thirty days, and if the proceeding has not been concluded and an order made at the expiration of such thirty days, the proposed change of rate, charge, regulation, or practice shall go into effect at the end of such period.

(f) After the expiration of the sixty days referred to in subdivision (a) no person shall carry on the business of a stockyard owner or market agency unless the rates and charges for the stockyard services furnished at the stockyard have been filed and published in accordance with this section and the orders of the Secretary made thereunder; nor charge, demand, or collect a greater or less or different compensation for such services than the rates and charges specified in the schedules filed and in effect at the time; nor refund or remit in any manner any portion of the rates or charges so specified (but this shall not prohibit a cooperative association of producers from bona fide returning to its members, on a patronage basis, its excess earnings on their live stock, subject to such regulations as the Secretary may prescribe); nor extend to any person at such stockyard any stockyard services except such as are specified in such schedules.

(g) Whoever fails to comply with the provisions of this section or of any regulation or order of the Secretary made thereunder shall be liable to a penalty of not more than $500 for each such offense, and not more than $25 for each day it continues, which shall accrue to the United States and may be recovered in a civil action brought by the United States.

(h) Whoever willfully fails to comply with the provisions of this section or of any regulation or order of

the Secretary made thereunder shall on conviction be fined not more than $1,000, or imprisoned not more than one year, or both.

SEC. 307. It shall be the duty of every stockyard owner and market agency to establish, observe, and enforce just, reasonable, and nondiscriminatory regulations and practices in respect to the furnishing of stockyard services, and every unjust, unreasonable, or discriminatory regulation or practice is prohibited and declared to be unlawful.

SEC. 308. (a) If any stockyard owner, market agency, or dealer, violates any of the provisions of sections 304, 305, 306, or 307, or of any order of the Secretary made under this title, he shall be liable to the person or persons injured thereby for the full amount of damages sustained in consequence of such violation.

(b) Such liability may be enforced either (1) by complaint to the Secretary as provided in section 309, or (2) by suit in any district court of the United States of competent jurisdiction; but this section shall not in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this Act are in addition to such remedies.

SEC. 309. (a) Any person complaining of anything done or omitted to be done by any stockyard owner, market agency, or dealer (hereinafter in this section referred to as the "defendant") in violation of the provisions of sections 304, 305, 306, or 307, or of an order of the Secretary made under this title, may, at any time within ninety days after the cause of action accrues, apply to the Secretary by petition which shall briefly state the facts, whereupon the complaint thus made shall be forwarded by the Secretary to the defendant, who shall be called upon to satisfy the complaint, or to answer it in writing, within a reasonable time to be speci-

fied by the Secretary. If the defendant within the time specified makes reparation for the injury alleged to be done he shall be relieved of liability to the complainant only for the particular violation thus complained of. If the defendant does not satisfy the complaint within the time specified, or there appears to be any reasonable ground for investigating the complaint, it shall be the duty of the Secretary to investigate the matters complained of in such manner and by such means as he deems proper.

(b) The Secretary, at the request of the live-stock commissioner, Board of Agriculture, or other agency of a State or Territory, having jurisdiction over stockyards in such State or Territory, shall investigate any complaint forwarded by such agency in like manner and with the same authority and powers as in the case of a complaint made under subdivision (a).

(c) The Secretary may at any time institute an inquiry on his own motion, in any case and as to any matter or thing concerning which a complaint is authorized to be made to or before the Secretary, by any provision of this title, or concerning which any question may arise under any of the provisions of this title, or relating to the enforcement of any of the provisions of this title. The Secretary shall have the same power and authority to proceed with any inquiry instituted upon his own motion as though he had been appealed to by petition, including the power to make and enforce any order or orders in the case or relating to the matter or thing concerning which the inquiry is had, except orders for the payment of money.

(d) No complaint shall at any time be dismissed because of the absence of direct damage to the complainant.

(e) If after hearing on a complaint the Secretary de-

termines that the complainant is entitled to an award of damages, the Secretary shall make an order directing the defendant to pay to the complainant the sum to which he is entitled on or before a day named.

(f) If the defendant does not comply with an order for the payment of money within the time limit in such order, the complainant, or any person for whose benefit such order was made, may within one year of the date of the order file in the district court of the United States for the district in which he resides or in which is located the principal place of business of the defendant or in any State court having general jurisdiction of the parties, a petition setting forth briefly the causes for which he claims damages and the order of the Secretary in the premises. Such suit in the district court shall proceed in all respects like other civil suits for damages except that the findings and orders of the Secretary shall be *prima facie* evidence of the facts therein stated, and the petitioner shall not be liable for costs in the district court nor for costs at any subsequent stage of the proceedings unless they accrue upon his appeal. If the petitioner finally prevails, he shall be allowed a reasonable attorney's fee to be taxed and collected as a part of the costs of the suit.

SEC. 310. Whenever after full hearing upon a complaint made as provided in section 309, or after full hearing under an order for investigation and hearing made by the Secretary on his own initiative, either in extension of any pending complaint or without any complaint whatever, the Secretary is of the opinion that any rate, charge, regulation, or practice of a stockyard owner or market agency, for or in connection with the furnishing of stockyard services, is or will be unjust, unreasonable, or discriminatory, the Secretary—

(a) May determine and prescribe what will be the

just and reasonable rate or charge, or rates or charges, to be thereafter observed in such case, or the maximum or minimum, or maximum and minimum, to be charged, and what regulation or practice is or will be just, reasonable, and nondiscriminatory to be thereafter followed; and

(b) May make an order that such owner or operator (1) shall cease and desist from such violation to the extent to which the Secretary finds that it does or will exist; (2) shall not thereafter publish, demand, or collect any rate or charge for the furnishing of stockyard services other than the rate or charge so prescribed, or in excess of the maximum or less than the minimum so prescribed, as the case may be; and (3) shall conform to and observe the regulation or practice so prescribed.

SEC. 311. Whenever in any investigation under the provisions of this title, or in any investigation instituted by petition of the stockyard owner or market agency concerned, which petition is hereby authorized to be filed, the Secretary after full hearing finds that any rate, charge, regulation, or practice of any stockyard owner or market agency, for or in connection with the buying or selling on a commission basis or otherwise, receiving, marketing, feeding, holding, delivery, shipment, weighing, or handling, not in commerce, of live stock, causes any undue or unreasonable advantage, prejudice, or preference as between persons or localities in intrastate commerce in live stock on the one hand and interstate or foreign commerce in live stock on the other hand, or any undue, unjust, or unreasonable discrimination against interstate or foreign commerce in live stock, which is hereby forbidden and declared to be unlawful, the Secretary shall prescribe the rate, charge, regulation, or practice thereafter to be observed, in such manner as, in his judgment, will remove such advantage,

preference, or discrimination. Such rates, charges, regulations, or practices shall be observed while in effect by the stockyard owners or market agencies parties to such proceeding affected thereby, the law of any State or the decision or order of any State authority to the contrary notwithstanding.

SEC. 312. (a) It shall be unlawful for any stockyard owner, market agency, or dealer to engage in or use any unfair, unjustly discriminatory, or deceptive practice or device in connection with the receiving, marketing, buying or selling on a commission basis or otherwise, feeding, watering, holding, delivery, shipment, weighing or handling, in commerce at a stockyard, of live stock.

(b) Whenever complaint is made to the Secretary by any person, or whenever the Secretary has reason to believe, that any stockyard owner, market agency, or dealer is violating the provisions of subdivision (a), the Secretary after notice and full hearing may make an order that he shall cease and desist from continuing such violation to the extent that the Secretary finds that it does or will exist.

SEC. 313. Except as otherwise provided in this Act, all orders of the Secretary under this title, other than orders for the payment of money, shall take effect within such reasonable time, not less than five days, as is prescribed in the order, and shall continue in force until his further order, or for a specified period of time, according as is prescribed in the order, unless such order is suspended or modified or set aside by the Secretary or is suspended or set aside by a court of competent jurisdiction.

SEC. 314. (a) Any stockyard owner, market agency, or dealer who knowingly fails to obey any order made under the provisions of sections 310, 311, or 312 shall forfeit to the United States the sum of $500 for each

offense. Each distinct violation shall be a separate offense, and in case of a continuing violation each day shall be deemed a separate offense. Such forfeiture shall be recoverable in a civil suit in the name of the United States.

(b) It shall be the duty of the various district attorneys, under the direction of the Attorney General, to prosecute for the recovery of forfeitures. The costs and expense of such prosecution shall be paid out of the appropriation for the expenses of the courts of the United States.

SEC. 315. If any stockyard owner, market agency, or dealer fails to obey any order of the Secretary other than for the payment of money while the same is in effect, the Secretary, or any party injured thereby, or the United States by its Attorney General, may apply to the district court for the district in which such person has his principal place of business for the enforcement of such order. If after hearing the court determines that the order was lawfully made and duly served and that such person is in disobedience of the same, the court shall enforce obedience to such order by a writ of injunction or other proper process, mandatory or otherwise, to restrain such person, his officers, agents, or representatives from further disobedience of such order or to enjoin upon him or them obedience to the same.

SEC. 316. For the purposes of this title, the provisions of all laws relating to the suspending or restraining the enforcement, operation, or execution of, or the setting aside in whole or in part the orders of the Interstate Commerce Commission, are made applicable to the jurisdiction, powers, and duties of the Secretary in enforcing the provisions of this title, and to any person subject to the provisions of this title.

TITLE IV.—GENERAL PROVISIONS.

SEC. 401. Every packer, stockyard owner, market agency, and dealer shall keep such accounts, records, and memoranda as fully and correctly disclose all transactions involved in his business, including the true ownership of such business by stockholding or otherwise. Whenever the Secretary finds that the accounts, records, and memoranda of any such person do not fully and correctly disclose all transactions involved in his business, the Secretary may prescribe the manner and form in which such accounts, records, and memoranda shall be kept, and thereafter any such person who fails to keep such accounts, records, and memoranda in the manner and form prescribed or approved by the Secretary shall upon conviction be fined not more than $5,000, or imprisoned not more than three years, or both.

SEC. 402. For the efficient execution of the provisions of this Act, and in order to provide information for the use of Congress, the provisions (including penalties) of sections 6, 8, 9, and 10 of the Act entitled "An Act to create a Federal Trade Commission, to define its powers and duties, and for other purposes," approved September 26, 1914, are made applicable to the jurisdiction, powers, and duties of the Secretary in enforcing the provisions of this Act and to any person subject to the provisions of this Act, whether or not a corporation. The Secretary, in person or by such agents as he may designate, may prosecute any inquiry necessary to his duties under this Act in any part of the United States.

SEC. 403. When construing and enforcing the provisions of this Act, the act, omission, or failure of any agent, officer, or other person acting for or employed by any packer, stockyard owner, market agency, or dealer, within the scope of his employment or office,

shall in every case also be deemed the act, omission, or failure of such packer, stockyard owner, market agency, or dealer, as well as that of such agent, officer, or other person.

SEC. 404. The Secretary may report any violation of this Act to the Attorney General of the United States, who shall cause appropriate proceedings to be commenced and prosecuted in the proper courts of the United States without delay.

SEC. 405. Nothing contained in this Act, except as otherwise provided herein, shall be construed—

(a) To prevent or interfere with the enforcement of, or the procedure under, the provisions of the Act entitled "An Act to protect trade and commerce against unlawful restraints and monopolies," approved July 2, 1890, the Act entitled "An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes," approved October 15, 1914, the Interstate Commerce Act as amended, the Act entitled "An Act to promote export trade, and for other purposes," approved April 10, 1918, or sections 73 to 77, inclusive, of the Act of August 27, 1894, entitled "An Act to reduce taxation, to provide revenue for the Government, and for other purposes," as amended by the Act entitled "An Act to amend sections seventy-three and seventy-six of the Act of August twenty-seventh, eighteen hundred and ninety-four, entitled 'An Act to reduce taxation, to provide revenue for the Government, and for other purposes,' " approved February 12, 1913, or

(b) To alter, modify, or repeal such Acts or any part or parts thereof, or

(c) To prevent or interfere with any investigation, proceeding, or prosecution begun and pending at the time this Act becomes effective.

SEC. 406. (a) Nothing in this Act shall affect the power or jurisdiction of the Interstate Commerce Commission, nor confer upon the Secretary concurrent power or jurisdiction over any matter within the power or jurisdiction of such Commission.

(b) On and after the enactment of this Act, and so long as it remains in effect, the Federal Trade Commission shall have no power or jurisdiction so far as relating to any matter which by this Act is made subject to the jurisdiction of the Secretary, except in cases in which, before the enactment of this Act, complaint has been served under section 5 of the Act entitled "An Act to create a Federal Trade Commission, to define its power and duties, and for other purposes," approved September 26, 1914, or under section 11 of the Act entitled "An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes," approved October 15, 1914, and except when the Secretary of Agriculture, in the exercise of his duties hereunder, shall request of the said Federal Trade Commission that it make investigations and report in any case.

SEC. 407. The Secretary may make such rules, regulations and orders as may be necessary to carry out the provisions of this Act and may cooperate with any department or agency of the Government, any State, Territory, District, or possession, or department, agency or political subdivision thereof, or any person; and shall have the power to appoint, remove, and fix the compensation of such officers and employees, not in conflict with existing law, and make such expenditures for rent outside the District of Columbia, printing, telegrams, telephones, law books, books of reference, periodicals, furniture, stationery, office equipment, travel, and other supplies and expenses as shall be necessary to the adminis-

tration of this Act in the District of Columbia and elsewhere, and as may be appropriated for by Congress, and there is hereby authorized to be appropriated, out of the money in the Treasury not otherwise appropriated, such sums as may be necessary for such purpose.

SEC. 408. If any provision of this Act or the application thereof to any person or circumstances is held invalid, the validity of the remainder of the Act and of the application of such provision to other persons and circumstances shall not be affected thereby.

Approved, August 15, 1921.

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ARGUMENT—Continued.

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STATUTES.

In the Supreme Court of the United States.

OCTOBER TERM, 1921.

T. B. STAFFORD AND S. B. STAFFORD, Co-partners doing business as Stafford Brothers, et al., Appellants,

v.

HENRY C. WALLACE, SECRETARY OF AGRICULTURE, and Charles F. Clyne, United States Attorney for the Northern District of Illinois, Appellees.

No. 687.

JAMES EUGENE BURTON, JAMES LOWELL Cook, John Henry Keiner, Jr., John William Kelly, William Henry Mooney, Charles LeRoy Wagner, and William Leslie Walsh, Appellants,

v.

CHARLES F. CLYNE, UNITED STATES Attorney for the Northern District of Illinois, Appellee.

No. 691.

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS.

BRIEF FOR THE APPELLEES.

STATEMENT.

The general question is, is the Act of Congress, approved August 15, 1921, known as the "Packers

and Stockyards Act, 1921," as applied to the appellant Commission Merchants (No. 687) and appellant Traders (No. 691) constitutional?

In a vigorous opinion Circuit Judge Evan A. Evans and District Judges Landis and FitzHenry sitting *in banc* in the District Court unanimously held against the appellants in both cases (No. 687, Tr. 41; No. 691, Tr. 21).

From an order denying application for a preliminary injunction in each case the appellants appealed to this court under Section 316 of the Packers and Stockyards Act, 1921, which provides that "the provisions of all laws relating to the suspending or restraining the enforcement, operation, or execution of, or the setting aside in whole or in part the orders of the Interstate Commerce Commission are made applicable to the jurisdiction, powers, and duties of the Secretary (of Agriculture) in enforcing the provisions of this title, and to any person subject to the provisions of this title."

No. 687. THE COMMISSION MERCHANTS.

Approximately 250 persons, firms and corporations aver that they are individually engaged in competition with each other in the business of live stock commission merchants at the Union Stock Yards in Chicago (Tr. 6), which is a live stock market in which cattle, calves, sheep, swine and goats consigned to various persons at the stockyards from various points in the United States are dealt in, bought and sold; that the business consists in the

receiving, buying, selling and handling upon a commission basis of such live stock for the account of other persons, such commission being paid upon an established per head rate for the service rendered in buying, selling, handling, and caring for such live stock at the Union Stock Yards; that they have no part in or control over the disposition of the live stock sold to, or purchased by them for, others; that the sole compensation for their services is the commission, which is deducted by them from the proceeds of sale and the balance is remitted to their customers and shippers, respectively; that their business is merely assisting the owner of live stock to find a market, and that the amount of the commission collected by appellants is in no way dependent upon or related to the amount of money for which the live stock is bought or sold upon the market at the Union Stock Yards and is in no way connected with or related to the transportation in commerce; that such commission charges are in no way whatever affected by the fact of a consignment of live stock being in whole or in part an interstate or intrastate shipment; that live stock is shipped to them by their customers or shippers to be sold by them as live stock commission merchants upon the open market at Union Stock Yards to the highest bidder for cash; that their duty is to sell shipments of live stock thus consigned to them by the owners for the aforesaid purposes and arrange for their care and handling, including proper feeding and watering, and to sell such live stock upon the open market to the highest

bidder (Tr. 8), using their skill, judgment and experience as live stock salesmen to secure the highest price possible in a competitive market for such live stock and to remit to the owner or consignor the balance of the proceeds realized from the sale thereof as promptly as possible after deducting their commission charges, freight and yardage charges paid by them in connection with the handling, feeding and care of such live stock pending their sale; that in carrying on their business they compete with each other and with other market agencies in the buying and selling of live stock upon the public market at Chicago.

They further aver that in the performance of their duties they act merely as the intermediaries between the purchaser and seller, and that their sole interest in and connection with the handling and care of the live stock which comes into their hands is to secure for the owner the best available price upon the open market and to purchase for their principals the live stock which may be desired at the lowest procurable price upon the open market; that the services performed by them are no part of commerce in live stock, and that the price charged by them for services has no relation to, effect or bearing upon, the price at which such live stock is bought or sold or the cost of transportation; that the services are performed wholly within the Union Stock Yards, and that the business does not involve the dealing in or handling of any commodity in interstate commerce upon their own account, but solely the affording of facilities and the

rendering of services at Union Stock Yards in respect to the handling and care of the live stock, and that they have no control whatever over the live stock or the disposition thereof after sale or purchase, and have nothing whatever to do with the live stock prior to its coming into their possession at the Union Stock Yards or after it leaves their possession (Tr. 9).

No. 691. THE TRADERS.

Seven individuals aver that they are residents of Chicago and that they bring their bill in their own behalf and in behalf of all other members of Traders' Live-Stock Exchange of Chicago and all the other yard traders or dealers who may join in the bill who do business at the stockyards of the Union Stock Yard & Transit Company of Chicago (Tr. 3), which now owns, maintains, and operates in Chicago a general union stockyard and public live-stock market thereat; that the company was incorporated, among other purposes, for the receiving, safekeeping, feeding, bedding, watering, weighing, delivery, and transfer of live stock of all descriptions; that it maintains and operates pens for the purpose of enclosing, holding, and caring for all live stock received at the stockyards; that the area for stockyard purposes is over 400 acres, with 300 miles of railroad tracks, consisting of main lines connecting with trunk lines entering Chicago and a large number of switches to the various packing houses and industries; that the Chicago stockyards are the largest in the world, receiving and handling in 1920, 15,423,872 head of live stock of the market

value of $665,421,232; in 1921, approximately an equal number of the estimated value of over $500,000,000; that vast numbers of live stock are shipped to and from the stockyards from and to points outside of Illinois; that substantially all the live stock shipped to and received at the stockyards is shipped on consignment and consigned to commission merchants, who sell and dispose of the live stock exclusively for a commission or brokerage, and none buys or sells for his own account or business; that all of the live stock is sold by the commission merchants to purchasers who buy for slaughter at packing houses in the stockyards, or for shipment to packing houses outside of Illinois, or for purposes of feeding and fattening the same, or to the appellants and other yard traders or dealers; that in 1920 and 1921 the sales at the Chicago stockyards of commission merchants to members of the Traders' Exchange amounted to about one-third of the total receipts for each year of the total values of $221,807,000 and $150,000,000, respectively (Tr. 6).

They aver that the manner of shipping, handling, buying, and selling nearly all of the live stock received at the stockyards is as follows: The live stock is shipped principally from points outside of Illinois, is loaded at points of origin in live-stock cars built expressly for the purpose of holding and carrying live stock, is shipped under a live-stock shipping contract issued by the rail carriers corresponding to what is known as a straight bill of lading; that the rail carriers do not issue an order bill of lading and

all live stock is shipped on consignment expressly and delivered to the commission merchants; that the live stock, promptly upon its arrival, is unloaded by the Union Stock Yard & Transit Company from live-stock cars onto chutes in the stockyards and then and there by the Company delivered to the commission merchants to whom the live stock is consigned; that the live stock is then at once driven from the chutes by the commission merchants to the pens in the stockyards that have been assigned by the Stockyard Company to the commission merchants for their use; that the live stock which is then in the exclusive possession, custody, and control of the commission merchants, is watered and fed by the Company at the request of the commission merchants and at the cost of the consignors of the live stock; that contemporaneously with the delivery of the live stock to the commission merchants, the carriage and transportation thereof are forthwith ended and the transportation and transit thereof are completely terminated; that all purchases of live stock consigned to the commission merchants are made by packers for purposes of slaughter at packing houses located at the stockyards, or by agents or representatives of outside packing houses located at points outside of Illinois, or by appellants or other yard traders or dealers doing business at the stockyards, or by country buyers who purchase for feeding; that not until after the delivery of the live stock to the commission merchants and not until after the carriage and transportation of the live stock have completely terminated

and ceased does the business of the yard traders or dealers begin; that the yard traders and dealers are engaged in business exclusively on their own account and for their own benefit; that they never have and do not now buy or sell on commission, but they buy and sell exclusively for their own benefit, and all gain or loss made in all transactions belongs to or is sustained by them; that the business of one of the appellants has approximated $4,000,000 per year.

They further aver that the greater part of all live stock consigned to and received by the commission merchants is shipped and delivered to them in carload or train-load lots and a substantial part is not graded or conditioned to meet the specific wants or requirements of the packer buyers or the other buyers; that a very large part of all such live stock receipts by the commission merchants is sold by them to appellants and other yard traders or dealers at the stockyards who in turn separate, segregate, grade, and classify mixed live stock, and grade and mix the same with like grades in other purchases which appellants and other yard traders or dealers make, thus enabling them to grade and classify live stock to meet the wants and requirements of buyers; that the traders and dealers buy in the open market at the stockyards in open competition with each other and with other traders and dealers and with packer purchasers and other purchasers; and that all purchases made by appellants and other yard traders or dealers are made for the sole purpose of reselling at the stockyards to yard traders and dealers and other

purchasers at the stockyards; that the live stock consigned to and received by the commission merchants is by them sold and disposed of as promptly as possible and rarely held for more than a few days and then only to enable them to make a more satisfactory sale; that all live stock purchased by appellants or other yard traders or dealers is purchased by them only from the commission merchants or other yard traders or dealers and immediately after such purchase is delivered by the sellers to them at the stockyards and placed in pens assigned by the Union Stock Yard & Transit Company for the use of appellants or other yard traders or dealers at the stockyards; that immediately upon the purchase of the live stock at the stockyards by the appellants or other yard traders or dealers at the stockyards the live stock so purchased is weighed out to the appellants and the other yard traders or dealers, upon the scales of the Company, and paid for by the purchasers to the sellers in accordance with the scale weights (Tr. 8); that there is no continuity of movement in interstate commerce of the live stock through the stockyards but that such continuity of movement has completely ceased and terminated when the live stock has been delivered to the commission merchants by the rail carriers; that all live stock purchased by appellants and the other yard traders or dealers is immediately after such purchase delivered into their possession and custody, and immediately after such purchase and delivery to them is paid for by them to the sellers;

that the title vests immediately in appellants or other yard traders or dealers at the stockyards after such purchase by them of the stock; that frequently the live stock so purchased by appellants or other yard traders or dealers remains in their exclusive possession or custody for several days awaiting the opportunity which the appellants and the other yard traders or dealers seek, obtaining, if possible, a more advantageous opportunity for the sale of the live stock; and during all of that time the live stock is fed and watered by the Union Stock Yard & Transit Company at the exclusive expense of the appellants or the other yard traders or dealers; that the Traders' Live Stock Exchange was incorporated March 26, 1907, not for profit and has at least 528 members, including appellants, all of whom are yard traders or dealers in live stock at the stockyards either as principals or employees; that it was incorporated for the express purpose of promoting and protecting all interests connected with buying and selling of live stock at the stockyards and of cultivating courteous and manly conduct among the traders or dealers and for the purpose of giving dignity and responsibility to them; that there are about 2,000 yard traders or dealers engaged in the same kind of business at stockyards located at various points, nearly all of whom are members of different traders' live stock exchanges, which, in turn, are members of the National Traders' Live Stock Exchange, whose total membership conducts an aggregate business in excess of one billion dollars.

THE ISSUES.

The Packers and Stockyards Act, approved August 15, 1921, is entitled "An Act to Regulate Interstate and Foreign Commerce in Live Stock," etc.

Title III—Stockyards—provides:

SEC. 301. When used in this Act—

(*a*) The term "stockyard owner" means any person engaged in the business of conducting or operating a stockyard;

(*b*) The term "stockyard services" means services or facilities furnished at a stockyard in connection with the receiving, buying or selling on a commission basis or otherwise, marketing, feeding, watering, holding, delivery, shipment, weighing, or handling, in commerce, of live stock;

(*c*) The term "market agency" means any person engaged in the business of (1) buying or selling in commerce live stock at a stockyard on a commission basis or (2) furnishing stockyard services; and

(*d*) The term "dealer" means any person, not a market agency, engaged in the business of buying or selling in commerce live stock at a stockyard, either on his own account or as the employee or agent of the vendor or purchaser.

SEC. 302. (*a*) When used in this title the term "stockyard" means any place, establishment, or facility commonly known as stockyards, conducted or operated for compensation or profit as a public market, consisting of pens, or other inclosures, and their appurtenances, in which live cattle, sheep, swine, horses, mules, or goats are received, held, or kept for sale or ship-

ment in commerce. This title shall not apply to a stockyard of which the area normally available for handling live stock, exclusive of runs, alleys, or passageways, is less than twenty thousand square feet.

(*b*) The Secretary shall from time to time ascertain, after such inquiry as he deems necessary, the stockyards which come within the foregoing definition, and shall give notice thereof to the stockyard owners concerned, and give public notice thereof by posting copies of such notice in the stockyard, and in such other manner as he may determine. After the giving of such notice to the stockyard owner and to the public, the stockyard shall remain subject to the provisions of this title until like notice is given by the Secretary that such stockyard no longer comes within the foregoing definition.

SEC. 303. After the expiration of thirty days after the Secretary has given public notice that any stockyard is within the definition of section 302, by posting copies of such notice in the stockyard, no person shall carry on the business of a market agency or dealer at such stockyard unless he has registered with the Secretary under such rules and regulations as the Secretary may prescribe, his name and address, the character of business in which he is engaged and the kinds of stockyard services, if any, which he furnishes at such stockyard. Whoever violates the provisions of this section shall be liable to a penalty of not more than $500 for each such

offense and not more than $25 for each day it continues, which shall accrue to the United States and may be recovered in a civil action brought by the United States.

Section 308 provides:

(*a*) If any stockyard owner, market agency, or dealer, violates any of the provisions of sections 304, 305, 306, or 307, or of any order of the Secretary made under this title, he shall be liable to the person or persons injured thereby for the full amount of damages sustained in consequence of such violation.

Section 312 provides:

(*a*) It shall be unlawful for any stockyard owner, market agency, or dealer to engage in or use any unfair, unjustly discriminatory, or deceptive practice or device in connection with the receiving, marketing, buying or selling on a commission basis or otherwise, feeding, watering, holding, delivery, shipment, weighing or handling, in commerce at a stockyard, of live stock.

(*b*) Whenever complaint is made to the Secretary by any person, or whenever the Secretary has reason to believe, that any stockyard owner, market agency, or dealer is violating the provisions of subdivision (*a*), the Secretary after notice and full hearing may make an order that he shall cease and desist from continuing such violation to the extent that the Secretary finds that it does or will exist.

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Section 314 provides:

> (*a*) Any stockyard owner, market agency, or dealer who knowingly fails to obey any order made under the provisions of sections 310, 311, or 312 shall forfeit to the United States the sum of $500 for each offense. Each distinct violation shall be a separate offense, and in case of a continuing violation each day shall be deemed a separate offense. Such forfeiture shall be recoverable in a civil suit in the name of the United States.
>
> (*b*) It shall be the duty of the various district attorneys, under the direction of the Attorney General, to prosecute for the recovery of forfeitures. The costs and expense of such prosecution shall be paid out of the appropriation for the expenses of the courts of the United States.

Section 315 provides:

> If any stockyard owner, market agency, or dealer fails to obey any order of the Secretary other than for the payment of money while the same is in effect, the Secretary, or any party injured thereby, or the United States by its Attorney General, may apply to the district court for the district in which such person has his principal place of business for the enforcement of such order. If after hearing the court determines that the order was lawfully made and duly served and that such person is in disobedience of the same, the court shall enforce obedience to such order by a writ of injunction or other proper process, mandatory or otherwise, to

restrain such person, his officers, agents, or representatives from further disobedience of such order or to enjoin upon him or them obedience to the same.

Title IV—General Provisions—provides:

SEC. 401. Every packer, stockyard owner, market agency, and dealer shall keep such accounts, records, and memoranda as fully and correctly disclose all transactions involved in his business, including the true ownership of such business by stockholding or otherwise. Whenever the Secretary finds that the accounts, records, and memoranda of any such person do not fully and correctly disclose all transactions involved in his business, the Secretary may prescribe the manner and form in which such accounts, records, and memoranda shall be kept, and thereafter any such person who fails to keep such accounts, records, and memoranda in the manner and form prescribed or approved by the Secretary shall upon conviction be fined not more than $5,000, or imprisoned not more than three years, or both.

* * * * *

SEC. 403. When construing and enforcing the provisions of this Act, the act, omission, or failure of any agent, officer, or other person acting for or employed by any packer, stockyard owner, market agency, or dealer, within the scope of his employment or office, shall in every case also be deemed the act, omission, or failure of such packer, stockyard owner, market agency, or dealer, as well as that of such agent, officer, or other person.

In No. 687, paragraph (*c*) of Section 301, under Title III, is assailed by the commission merchants. They allege that Title III in so far as it affects, or attempts to affect, or in any manner control, or relate to, their business violates Section 8, Article I of the Constitution—the commerce clause; that Title IV violates Article 4 of the Amendments—the unreasonable search and seizure clause; that Section 303 of Title III violates Article V of the Amendments in that it attempts to deprive them of their property without due process of law; that paragraph (*a*) of Section 302 of Title III violates Article V of the Amendments in that it arbitrarily excepts stockyards not having an area, exclusive of runs, alleys, or passageways, of more than 20,000 square feet; that Title III and Title IV violate Article X of the Amendments, in that they attempt to regulate, control, and interfere with business wholly intrastate and not a part of interstate commerce; and that Title III, and particularly Section 303, violates Article V of the Amendments.

In No. 691, paragraph (*d*) of Section 301, under Title III, is assailed by the traders or dealers. They allege that the entire act, in so far as it pertains to them, is unconstitutional; and the provisions particularly referred to are paragraph (*b*) of Section 2; paragraph (*d*) of Section 301; Section 303; paragraph (*a*) of Section 308; paragraphs (*a*) and (*b*) of Section 312; paragraphs (*a*) and (*b*) of Section 314; and Sections 315, 401, and 403. They further allege that the rules and regulations of the Secretary of Agriculture, under

the foregoing provisions, violate Article I, Section 8, Clause 3, of the Constitution, and the Fourth, Fifth, Eighth, and Tenth Amendments, in that they attempt to regulate commerce wholly intrastate; violate the rights of the traders or dealers to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures; deprive them of life, liberty, and property without due process of law; take private property for public use without just compensation; impose excessive fines, and inflict cruel and unusual punishments.

In the brief filed in No. 691 the learned counsel argues the single question that the traders or dealers are not engaged in interstate commerce, hence those parts of the act which seek to control and regulate their business are unconstitutional. In the brief filed in No. 687 the learned counsel for the commission merchants argue the additional questions that the act makes an arbitrary classification of stockyards and subjects the commission merchants to unreasonable searches and seizures of their papers.

The learned District Court held that both the commission merchants and the traders and dealers were subject to the act and accordingly denied motions for preliminary injunctions.

THE CHICAGO UNION STOCKYARDS.

The volume of business at the Chicago Union Stock Yards is fairly disclosed in the bills. In No. 687, the averment that approximately 250 persons, firms, and corporations are engaged in competition with

each other as live-stock commission merchants would indicate a heavy volume of business. In No. 691, it is specifically averred that the Traders' Live Stock Exchange of Chicago has at least 528 members who are yard traders or dealers in the stockyards; that in 1920, 15,423,872 head of live stock of the market value of $665,421,232, and in 1921, approximately an equal number of the market value of over $500,000,000 were received and handled. In 1920 and 1921 the sales at the Chicago Union Stock Yards of commission merchants to members of the Traders' Exchange are alleged to be of the total values of $221,807,000 and $150,000,000, respectively, and to constitute about one-third of the total receipts for each year. The Interstate Commerce Commission has found that "more than 4,000 cars of live stock are frequently delivered at the stockyards in Chicago in a single day" (58 I. C. C. 164, 166).

In *Gibbons* v. *Ogden*, 9 Wheat., 185, 188, 195, Mr. Chief Justice Marshall — and his oft-quoted words are appropriate here—said:

> The words are, "Congress shall have power to regulate commerce with foriegn nations, and among the several states, and with the Indian tribes." The subject to be regulated is commerce; and our constitution being, as was aptly said at the bar, one of enumeration, and not of definition, to ascertain the extent of the power, it becomes necessary to settle the meaning of the word. The counsel for the appellee would limit it to traffic, to buying and selling, or the interchange of commodities,

and do not admit that it comprehends navigation. This would restrict a general term, applicable to many objects, to one of its significations. Commerce, undoubtedly, is traffic but it is something more—it is intercourse. It describes the commercial intercourse between nations, and parts of nations, in all its branches, and is regulated by prescribing rules for carrying on that intercourse.

* * * * *

We are now arrived at the inquiry—what is this power? It is the power to regulate; that is, to prescribe the rule by which commerce is to be governed. This power, like all others vested in Congress, is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the constitution.

In *The Brig Wilson*,[1] 1 Brockenbrough, 423, 431, which held that the vessels as well as the articles they

[1] In *The Life of John Marshall*, by Albert J. Beveridge, Vol. IV, p. 427, the author states that the opinion in *The Brig Wilson* was rendered four years before the arguments were made in *Gibbons* v. *Ogden*. Comparison shows that the opinion in the practically unknown case of *The Brig Wilson* was but the precursor of the later well known opinion in *Gibbons* v. *Ogden*. Mr. Beveridge says

The small information possessed by the most careful and thorough lawyers at that time concerning important decisions in the Circuit Courts of the United States, even when rendered by the Chief Justice himself, is startlingly revealed in all these arguments. Only four years previously, Marshall, at Richmond, had rendered an opinion in which he asserted the power of Congress over commerce as emphatically as Webster or Wirt now insisted upon it. This opinion would have greatly strengthened their arguments, and undoubtedly they would have cited it had they known of it. But neither Wirt nor Webster made the slightest reference to the case of The Brig Wilson, *vs.* The United States, decided during the May term, 1820.

One offense charged in the libel of that vessel by the National Government was, that she had brought into Virginia certain negroes in violation of the laws of that State and in contravention of the act of Congress forbidding

carry may be regulated, the learned Chief Justice, while holding the Circuit Court of the United States for the District of Virginia and North Carolina, had previously said:

> What is the extent of this power to regulate commerce? Does it not comprehend the navigation of the country? May not the vessels, as well as the articles they bring, be regulated? Upon what principle is it, that the ships of any foreign nation have been forbidden, under pain of forfeiture, to enter our ports? The authority to make such laws has never been questioned; and yet, it can be sustained by no other clause in the Constitution, than that which enables congress to regulate commerce. If this power over vessels is not in congress, where does it reside? Certainly it is not

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the importation of negroes into States whose laws prohibited their admission. Was this act of Congress constitutional? The power to pass such a law is, says Marshall, "derived entirely" from that clause of the Constitution which "enables Congress, 'to regulate commerce with foreign nations, and among the several States.'" This power includes navigation. The authority to forbid foreign ships to enter our ports comes exclusively from the commerce clause. "If this power over vessels is not in Congress, where does it reside? Does it reside in the States? * * * ."

* * * * *

The truth, continues Marshall, is that "even an empty vessel, or a packet, employed solely in the conveyance of passengers and letters, may be regulated and forfeited" under a National law. "There is not, in the Constitution, one syllable on the subject of navigation. And yet, every power that pertains to navigation has been * * * rightfully exercised by Congress. From the adoption of the Constitution, till this time, the universal sense of America has been, that the word commerce, as used in that instrument, is to be considered a generic term, comprehending navigation, or that a control over navigation is necessarily incidental to the power to regulate commerce."

Here was a weapon which Webster could have wielded with effect, but he was unaware that it existed—a fact the more remarkable in that both Webster and Emmet commented, in their arguments, upon State laws that prohibited the admission of negroes.

annihilated; and if not, it must reside somewhere. Does it reside in the states? No American politician has ever been so extravagant as to contend for this. No man has been wild enough to maintain, that, although the power to regulate commerce, gives congress an unlimited power over the cargoes, it does not enable that body to control the vehicle in which they are imported: that, while the whole power of commerce is vested in congress, the state legislatures may confiscate every vessel which enters their ports, and congress is unable to prevent their entry. Let it be admitted, for the sake of argument, that a law, forbidding a free man of any colour, to come into the United States, would be void, and that no penalty, imposed on him by congress, could be enforced: still, the vessel, which should bring him into the United States, might be forfeited, and that forfeiture enforced; since even an empty vessel, or a packet, employed solely in the conveyance of passengers and letters, may be regulated and forfeited. There is not, in the Constitution, one syllable on the subject of navigation. And yet, every power that pertains to navigation has been uniformly exercised, and, in the opinion of all, been rightfully exercised, by congress. From the adoption of the Constitution, till this time, the universal sense of America has been, that the word commerce, as used in that instrument, is to be considered a generic term, comprehending navigation, or, that a control over navigation is necessarily incidental to the power to regulate commerce.

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The power of Congress or its appropriate agencies to prescribe, regulate or control all instrumentalities, or parts thereof, by which interstate commerce is carried on or conducted is now thoroughly established.[2]

The court will take judicial notice that Chicago, the greatest live-stock and grain market in the world, is the eastern terminal of the western trunk lines, the western terminal of the eastern trunk lines, and the

[2] Wages of pilots (*Cooley* v. *Board of Wardens*, 12 How. 299; *Ex parte McNiel*, 13 Wall 236); Color blindness, qualification of employees (*Nashville, C. & St. L. Ry. Co.* v. *Alabama*, 128 U. S. 96); hours of service (*Baltimore & Ohio R. R. Co.* v. *Interstate Commerce Commission*, 221 U. S. 612); safety appliances, automatic couplers (*Johnson* v. *Southern Pacific Co.*, 196 U. S. 1); seamen's wages shall not be paid in advance (*Patterson* v. *Bark Eudora*, 190 U. S. 169); agreements restraining commerce forbidden (*Northern Securities Co.* v. *United States*, 193 U. S. 197); illegal boycotts (*Loewe* v. *Lawler*, 208 U. S. 274); full crews (*Chicago, R. I. & P. Ry. Co.* v. *Arkansas*, 219 U. S. 453; *St. Louis, I. M. & S. Ry. Co.* v. *Arkansas*, 240 U. S. 518); distribution of equipment, coal cars (*Interstate Commerce Comm.* v. *Illinois Central R. R. Co.*, 215 U. S. 452; *Interstate Commerce Comm.* v. *Chicago & Alton R. R. Co.*, 215 U. S. 479); pre-cooling and preicing of refrigerator cars (*Atchison, Topeka & Santa Fe Ry. Co.* v. *United States*, 232 U. S. 199, 221); joint use of terminals for switching (*Pennsylvania Co.* v. *United States*, 236 U. S. 351, 373; *Louisville & N. R. R. Co.* v. *United States*, 238 U. S. 1); pipe lines (*The Pipe Line Cases—Ohio Oil Co.* v. *United States*, 234 U. S. 548); books of account and records of all business, including intrastate business (*Interstate Commerce Commission* v. *Goodrich Transit Co.*, 224 U. S. 194); bills of lading (*United States* v. *Ferger*, 250 U. S. 199; *United States* v. *Alaska S. S. Co.*, 253 U. S. 113); locomotive headlights (*Atlantic Coast Line R. R. Co.* v. *Georgia*, 234 U. S. 280); running of separate trains instead of mixed freight and passenger trains (*Missouri Pacific Ry. Co.* v. *Kansas*, 216 U. S. 262, 269); car doors (*Loomis* v. *Lehigh Valley R. R. Co.*, 240 U. S. 43); contracts between employee and employer (*Patterson* v. *Bark Eudora*, 190 U. S. 169; *Robertson* v. *Baldwin*, 165 U. S. 275; *McLean* v. *Arkansas*, 211 U. S. 539; *Erie R. R. Co.* v. *Williams*, 233 U. S. 685); ash pans on locomotives (*Ash Pan Act*, 35 Stat. 476); locomotive boilers (*Boiler Inspection Act*, 36 Stat. 913); block signals (Joint Resolution, 34 Stat. 838; Urgent Deficiencies Act, Oct. 22, 1913, 38 Stat. 212); live stock shall not be confined in cars for period exceeding 28 hours (*United States* v. *Baltimore & O. S. W. R. R. Co.*, 222 U. S. 8); employers' liability (*Second Employers' Liability Cases*, 223 U. S. 1); tickets (*Commutation Rate Case*, 27 I. C. C. 549).

northern terminal of the central trunk lines. The Union Stock Yard & Transit Co. furnishes the terminal facilities. In *United States* v. *Union Stock Yard, etc.*, 226 U. S. 286, 303, 306, the organization, purpose, ownership, and methods of operation of that company, incorporated under a special act of the legislature of Illinois, February 13, 1865, Laws 1865, v. 2, p. 678, and of the lessee of its railroads, Chicago Junction Railway Co., are fully set forth. Rejecting the argument made in that case that the two companies were not engaged in interstate commerce, this court said:

> In view of this continuity of operation, the manner of compensation and the performance of services in connection with interstate transportation by railroads such as are described, are the Stock Yard Company and the Junction Company subject to the terms of the Act to Regulate Commerce and bound to conform to its requirements?
>
> * * * * *
>
> We think that these companies, because of the character of the service rendered by them, their joint operation and division of profits and their common ownership by a holding company, are to be deemed a railroad within the terms of the act of Congress to regulate commerce, and the services which they perform are included in the definition of transportation as defined in that act. It is the manifest purpose of the act to include interstate railroad carriers, and by its terms the act excludes transportation wholly within a State.

> In view of this purpose and so construing the act as to give it force and effect, we think the Stock Yard Company did not exempt itself from the operation of the law by leasing its railroad and equipment to the Junction Company, for it still receives two-thirds of the profits of that company and both companies are under a common stock ownership with its consequent control. We therefore think the Commerce Court was right in holding that the Junction Company should file its rates with the Interstate Commerce Commission and that it should also have held the Stock Yard Company subject to the provisions of the Interstate Commerce Acts.

In the transcript of that case it appears that the bill of complaint averred (p. 4) and the answer admitted (p. 46) that the Union Stock Yard Co. owned 550 acres of land in Chicago devoted to stockyard purposes, with the necessary docks, chutes, platforms, pens, and so forth. In *Chicago Live Stock Exchange* v. *A. T. & S. F. Ry. Co. et al*, 52 I. C. C. R. 209, the Union Stock Yard Co., by tariff filed to become effective May 21, 1917, sought to increase its charge for unloading and loading cars from 25 and 50 cents to 50 and 75 cents, respectively. After reviewing the opinion of this court, *supra*, the Commission found (p. 224) that "the Chicago stockyards are the terminals for the receipt and delivery of live stock of the railroad utilizing them." The protest of the Chicago Live Stock Exchange was dismissed and the investigation of the reasonableness of the increase was dis-

continued. In *Chicago Live Stock Exchange* v. *A. T. & S. F. Ry. Co.*, 58 I. C. C. 164, the Commission again found (pp. 166, 168) "that it was the duty of the carriers to unload and load live stock at that point (Chicago). * * * we are of opinion and find that the stockyards are in effect terminals of the line-haul carriers, the Junction Company and the Stockyard Company * * *; See also *Live Stock Loading and Unloading Charges*, 61 I. C. C. 223, *in re* public stockyards at Chicago and other western points.

The courts have frequently held stockyards to be common carriers engaged in interstate commerce. *Union Stock Yards Co.* v. *United States*, 169 Fed. Rep. 406; *United States* v. *Union Stock Yards Co.*, 161 Fed. Rep. 919; *United States* v. *Sioux City Stock Yards*, 162 Fed. Rep. 556; See also *Covington Stockyards* v. *Keith*, 139 U. S. 128; *Walker* v. *Keenan*, 73 Fed. Rep. 755.

That the Chicago Union Stockyards are now embraced within, and constitute a part of, those instrumentalities as fully and completely as if they were an integral part of the Santa Fe, or Pennsylvania, or any other railroad system, and should be regulated as such, is likewise beyond question. That the commercial transactions or sales within, and through the aid of, the facilities of these stockyards, whether conducted by the stockyards company, commission merchants, traders, or others, are as completely within the regulatory power of Congress, will now be shown.

ARGUMENT.

I.

THE COMMISSION MERCHANTS AND TRADERS OR DEALERS ARE SO COMPLETELY IDENTIFIED WITH AND SO DIRECTLY A PART OF THE CURRENT OF INTERSTATE COMMERCE OF LIVE STOCK FLOWING THROUGH THE UNION STOCKYARDS AS CLEARLY TO BRING THEM AND THEIR TRANSACTIONS WITHIN THE POWER OF CONGRESS TO REGULATE UNDER THE PACKERS AND STOCKYARDS ACT.

A. THE CONGRESS LEGISLATED ON A VAST AND VITAL SUBJECT AND ALL OF ITS RAMIFICATIONS AS AN ENTIRETY AND THE REVIEW BY THE JUDICIAL POWER SHOULD GO ON LINES NO LESS EXTENSIVE.

Title I—Definitions—Section 2, paragraph (b) provides:

> (*b*) For the purpose of this Act (but not in any wise limiting the foregoing definition) a transaction in respect to any article shall be considered to be in commerce if such article is part of that current of commerce usual in the live-stock and meat-packing industries, whereby live stock, meats, meat food products, live-stock products, dairy products, poultry, poultry products, or eggs, are sent from one State with the expectation that they will end their transit, after purchase, in another, including, in addition to cases within the above general description, all cases where purchase or sale is either for shipment to another State, or for slaughter of live stock within the State and the shipment outside the State of the products resulting from such slaughter. Articles normally in such current of commerce shall not be considered out of such current through resort being had to any means or device intended to remove transactions in respect

> thereto from the provisions of this Act. For the purpose of this paragraph the word "State" includes Territory, the District of Columbia, possession of the United States, and foreign nation.

The Packers and Stockyards Act, 1921, is a combination of the principles embraced within both the act to regulate commerce as amended and the Sherman Anti-Trust Act. By a single act the Congress embraced both the transportation of live stock and the commercial transactions therein in interstate commerce, including the meat packing industries—in all of their multitudinous aspects. The Congress also embraced within the act the legal principles announced in many opinions of this court. The draftsman of the act obviously had before him the opinion in *Swift & Co.* v. *United States*, 196 U. S. 375, 398, as the phrase "current of commerce" adopted in paragraph (b), section 2, *supra*, is taken from the following language of Mr. Justice Holmes, viz:

> When cattle are sent for sale from a place in one State, with the expectation that they will end their transit, after purchase, in another, and when in effect they do so, with only the interruption necessary to find a purchaser at the stock yards, and when this is a typical, constantly recurring course, the current thus existing is a current of commerce among the States, and the purchase of the cattle is a part and incident of such commerce. What we say is true at least of such a purchase by residents in another State from that of the seller and of the cattle.

The language of Circuit Judge Grosscup in *Swift & Co.* v. *United States*, 122 Fed. Rep. 529, 531, in issuing the preliminary injunction, is equally appropriate, viz:

> Commerce, briefly stated, is the sale or exchange of commodities. But that which the law looks upon as the body of commerce is not restricted to specific acts of sale or exchange. It includes the intercourse—all the initiatory and intervening acts, instrumentalities, and dealings—that directly bring about the sale or exchange. Thus, though sale or exchange is a commercial act, so also is the solicitation of the drummer, whose occupation it is to bring about the sale or exchange. (*Brennan* v. *Titusville*, 153 U. S. 289.) The whole transaction from initiation to culmination is commerce.
>
> When commerce, thus broadly defined, is between parties dealing from different States—to be effected so far as the immediate act of exchange goes by transportation from State to State it is "commerce between the States," within the meaning of the Constitution, and the statute known as the Sherman Act. But it is not the transportation that constitutes the transaction interstate commerce. That is an adjunct only, essential to commerce, but not the sole test. The underlying test is that the transaction, as an entirety, including each part calculated to bring about the result, reaches into two or more States; and that the parties dealing with reference thereto deal from different States.

> An interstate commercial transaction is, in this sense, an affair rising from different States, and centering in the act of exchange, each essential part of the affair being as much commerce as is the center. With this definition in mind, let us see what the transaction made out in the petition is.

The judicial power should approach the subject in the manner in which it was dealt by the Congress and the judicial review should go on equally broad lines. The case is not one to be examined, as opposing counsel would argue, through the small end of the judicial telescope. The argument that this Court should hold as unconstitutional the act as applicable to commission merchants and traders or dealers is also an argument that this court should not only overthrow the act but should overthrow as well its own decisions in *Swift & Co.* v. *United States* and subsequent cases.

In *United States* v. *Brigantine William*, 2 Hall's Law Journal, 255, 271, District Judge Davis, holding the United States District Court at Salem, Mass., September Term, A. D. 1808, said:

> Before a court can determine, whether a given act of congress, *bearing relation to a power with which it is vested*, be a legitimate exercise of that power, or transcend it, the degree of legislative discretion, admissible in the case, must first be determined. Legal discretion is limited. It is thus defined by Lord Coke, *Discretio est discernere, per legem, quid sit*

justum.* Political discretion has a far wider range. It embraces, combines and considers all circumstances, events and projects, foreign or domestick, that can affect the national interests. Legal discretion has not the means of ascertaining the grounds, on which political discretion may have proceeded.

B. COMMITTEE REPORTS AND EXPLANATORY STATEMENTS OF MEMBERS IN CHARGE.

Representative HAUGEN (Iowa), Chairman, on May 18, 1921, submitted the Report of the Committee on Agriculture to the Committee of the Whole House on the state of the Union, which report says:

> In *Swift* v. *United States* (196 U. S. 375) it is said that in the Hopkins case the question was left open as to what would have been the result if the combination had resulted in exorbitant charges. The case also lays down the important doctrine that:
>
> > When cattle are sent for sale from a place in one State, with the expectation that they will end their transit, after purchase, in another, and when in effect they do so, with only the interruption necessary to find a purchaser at the stockyards, and when this is a typical, constantly recurring course, the current thus existing is a current of commerce among the States, and the purchase of the cattle is a part and incident of such commerce.

* Lord Mansfield's translation: "*Discretion*, when applied to a court of justice, means *sound* discretion *guided by law*. It must be governed by rule, not by humour: it must not be arbitrary, vague, and fanciful; but legal and regular." (*Rex* v. *Wilkes*, 4 Burr. 2539.)

The bill makes it clear that Congress in treating this question is attempting to regulate evils which it has found to exist in respect to exorbitant charges and unreasonable practices on the stockyards, resulting in a direct burden upon interstate commerce, and that in the whole bill it is treating the entire slaughtering and meat-packing industry in all its ramifications as part of the "current of commerce" referred to in the Swift case. The bill in its definitions in section 2 repeats the language of the Swift case and contains a declaration "articles normally in such current of commerce shall not be considered out of such current through resort being had to any means or device intended to remove transactions in respect thereto from the provisions of this act." This clearly expresses the intention of Congress that all devices, whether skillful manipulation of corporate organization, or the setting up of dummies, or otherwise, should not result in an evasion of the act. If this great industry, bearing so important a relation to the welfare of the Nation, and constituting so large a part of interstate commerce, can escape the power of Congress by such devices, the power granted by the Constitution to regulate interstate commerce means nothing, a conclusion which the committee can not bring itself to believe is true.

Representative HAUGEN, on August 2, 1921, also submitted the Conference Report of the two Houses, which also says:

Amendment No. 3: This amendment strikes out of the bill a definition of "commerce" in-

tended to make it clear that Congress is looking at the meat-packing and live-stock industries as a whole, that the evils sought to be remedied are country-wide in their scope, and that Congress intends to exercise, in the bill, the fullest control of packers and stockyards which the Constitution permits; and the Senate recedes.

* * * * *

Amendment No. 6: The House bill defined "stockyard services" so as to include, among other things, services and facilities furnished at a stockyard in connection with the "marketing," in interstate or foreign commerce, of live stock. The Senate amendment, while not striking out the word "marketing" added the phrase "buying or selling on a commission basis." The House recedes with an amendment adding the words "or otherwise" at the end of the Senate amendment, thus making the bill cover all buying and selling whether or not on a commission basis, as provided in the House bill.

Amendment No. 7: The House bill defined "dealer" to mean any person "engaged in the business of buying or selling, in interstate or foreign commerce, live stock at a stockyard, either on his own account or as the employee or agent of the vendor or purchaser." The Senate amendment adds at the end of this definition words which merely repeat what was in the House bill; and the Senate recedes.

* * * * *

Amendment No. 11: The House bill made it unlawful for any stockyard owner, commission man, or dealer to engage in or use any

unfair, unjustly discriminatory, or deceptive practice or device in connection with, among other things, the "marketing" in interstate or foreign commerce at a stockyard of live stock. The Senate amendment, while not striking out the word "marketing" added the words "buying or selling on a commission basis." The House recedes with an amendment adding the words "or otherwise" at the end of the Senate amendment, thus making the bill cover all buying and selling, whether or not on a commission basis, as provided in the House bill.

C. HOPKINS v. UNITED STATES DISTINGUISHED.

The learned counsel rely on *Hopkins* v. *United States*, 171 U. S. 578, and in the commission merchants' case, No. 687, counsel say, "This case we believe to be *stare decisis*" (Br. 23). For obvious reasons that case is not controlling.

1. *Hopkins* v. *United States* arose under the Sherman Anti-Trust Act. Under that act the power to declare what was and what was not interstate commerce and who were and who were not within its provisions was left with the courts. In the instant case the act specifically includes the commission merchants and the traders or dealers for all purposes exactly as if each appellant had been mentioned by name. The question is, then, not whether the commission merchants and traders or dealers are included within the act by judicial interpretation, as in *Hopkins* v. *United States*, but whether the Congress had the power to designate them and their transactions as part of the "current of commerce" and as such as within the act.

2. Even in the absence of such specific designation, the commission merchants and traders or dealers might well, under the circumstances of the case, be included, for they form as much a part of the "current of commerce" as the railroads or the stockyards company. In *Swift & Co.* v. *United States*, the learned counsel for appellant in his brief in that case relied on *Hopkins* v. *United States* and *Anderson* v. *United States*. In *Swift & Co.* v. *United States*, *supra*, this court, in distinguishing *Hopkins* v. *United States* and *Anderson* v. *United States*, and speaking through Mr. Justice Holmes, said (p. 397):

> So, again, the line is distinct between this case and *Hopkins* v. *United States*, 171 U. S. 578. All that was decided there was that the local business of commission merchants was not commerce among the States, even if what the brokers were employed to sell was an object of such commerce. The brokers were not like the defendants before us, themselves the buyers and sellers. They only furnished certain facilities for the sales. Therefore, there again the effects of the combination of brokers upon the commerce was only indirect and not within the act. Whether the case would have been different if the combination had resulted in exorbitant charges, was left open. In *Anderson* v. *United States*, 171 U. S. 604, the defendants were buyers and sellers at the stockyards, but their agreement was merely not to employ brokers, or to recognize yard traders, who were not members of their asso-

ciation. Any yard trader could become a member of the association on complying with the conditions, and there was said to be no feature of monopoly in the case. It was held that the combination did not directly regulate commerce between the States, and, being formed with a different intent, was not within the act. The present case is more like *Montague & Co.* v. *Lowry*, 193 U. S. 38.

Moreover, in the argument at the Bar of this court of Mr. Attorney General Moody in the *Swift* case the following occurred:

> Mr. Justice PECKHAM. Does your argument require you to make any distinction between the case of *Hopkins*, or do you ask us to review that?
>
> The ATTORNEY GENERAL. No, sir; I yield entirely to the authority of the *Hopkins* case. I seek to distinguish this case from that. The question whether the sales of cattle *under these circumstances* were acts of interstate commerce was left open in the *Hopkins* case * * *.
>
> * * * * *
>
> Mr. JUSTICE WHITE. My recollection is that in the *Hopkins* case it was expressly declared that the ruling did not concern the sale of the cattle.
>
> The ATTORNEY GENERAL. I so understand the case. The question *whether sales of the kind under consideration* were *interstate sales was reserved for future decision;*[1] * * *.

[1] Italic ours.

3. *Hopkins* v. *United States* itself announced the principle on which the present legislation rests, viz (p. 597:)

> Definitions as to what constitutes interstate commerce are not easily given so that they shall clearly define the full meaning of the term. We know from the cases decided in this court that it is a term of very large significance. It comprehends, as it is said, intercourse for the purposes of trade in any and all its forms, including transportation, purchase, sale and exchange of commodities between the citizens of different States, and the power to regulate it embraces all the instruments by which such commerce may be conducted. *Welton* v. *Missouri*, 91 U. S. 275; *Mobile County* v. *Kimball*, 102 U. S. 691; *Gloucester Ferry Company* v. *Pennsylvania*, 114 U. S. 196; *Hooper* v. *California*, 155 U. S. 648, 653; *United States* v. *E. C. Knight Company*, 156 U. S. 1.

Chicago Board of Trade v. *United States*, 246 U. S. 231, is somewhat analagous to *Hopkins* v. *United States*. In the former case the opinion appears to assume that the transactions were in interstate commerce and that the parties who conducted them were engaged in interstate commerce; however, it was held that there was no combination or agreement which restrained trade and commerce under the Sherman Anti-Trust Act.

4. The question whether a live-stock exchange is embraced within the provisions of the Sherman Act is widely different from the question of the power of Congress to include commission merchants and traders

or dealers in the current of commerce covered in the Packers and Stockyards Act. In *Kelley* v. *Rhoads*, 188 U. S. 1, it was held that a herd of sheep driven at a reasonable rate of speed from a point in Utah, across the State of Wyoming, a distance of about 500 miles, to a point in Nebraska, for the purpose of shipment by rail from the latter point, is property moving in interstate commerce. The 15,423,872 head of live stock of the market value of $665,421,232 in 1920, and an equal number of the estimated value of over $500,000,000 in 1921, moving to, through, about, and from the Union Stock Yards, in some instances to an extent of 4,000 carloads a day, one-third of which is consigned to and sold by the commission merchants to members of the Traders' Exchange, would seem to be none the less less property moving in interstate commerce; and that the persons, firms, and corporations who, as consignees, receive this enormous volume, and in turn sell it for the account of the consignors, are subject to regulation in the form undertaken by the Packers and Stockyards Act. To strike out of and eliminate from the act the provisions which include the commission merchants and the traders or dealers would be to cut the act in two at a point as vital as if the court struck out and eliminated the Union Stock Yard & Transit Company as not subject to the regulatory power of Congress.

D. THE MORE RECENT OPINIONS WHICH APPROVINGLY CITE SWIFT & CO. v. UNITED STATES FULLY SUSTAIN THE ACT.

The shipper is a consignor of interstate commerce, who delivers to an interstate carrier live stock consigned to a consignee of interstate commerce; and during the entire time the live stock are in the stockyards they are in the custody of the Union Stock Yard & Transit Company, also an interstate carrier, who unloads, feeds, waters, and beds the same in its chutes, pens and other facilities. The latter company deals with the railroads and the commission merchant who represents the consignor. If the relation of the Stockyard Company and the consignor is that of shipper and carrier in interstate commerce, how may the commission merchant who conducts the sale and makes the payments to these common carriers of all their charges be eliminated? The commission merchants pay the carriers the full charges for freight, yardage, feed and service, and if the carriers should refund to certain merchants parts of these rates, could the charge of discrimination or rebating be defended on the ground that so far as the commission merchants were concerned the transactions were not in interstate commerce? It is useful to bear in mind that the entire "current of commerce" flows through the Union Stock Yard, and that *all* transactions in connection therewith are conducted within the enclosure of the Union Stock Yard. That is likewise true of the purchases and sales of the traders. While this "current of commerce" is swirling around within the 550 acres of

enclosure of the Union Stock Yard in the volume heretofore indicated, it is the judgment of Congress that every person and transaction which constitutes a continuing part of that current is subject to the Packers and Stockyards Act. These appellants are in much the same position as if consignor, consignee, commission merchants and traders all got aboard the trains and travelled with the live stock, say from Denver to Chicago, and traded therein *en route*. The authorities of the present term of the court abundantly sustain the power of Congress so to regulate such commerce.

In *United States* v. *Ferger*, 250 U. S. 199, 203, this court, speaking through Mr. Chief Justice White, said:

> * * * it is insisted that as there was and could be no commerce in a fraudulent and fictitious bill of lading, therefore the power of Congress to regulate commerce could not embrace such pretended bill. But this mistakenly assumes that the power of Congress is to be necessarily tested by the intrinsic existence of commerce in the particular subject dealt with, instead of by the relation of that subject to commerce and its effect upon it. We say mistakenly assumes, because we think it clear that if the proposition were sustained it would destroy the power of Congress to regulate, as obviously that power, if it is to exist, must include the authority to deal with obstruction to interstate commerce (*In Re Debs*, 158, U. S. 564) and with a host of other acts which, because of their relation to and influence upon

> interstate commerce, come within the power of Congress to regulate, although they are not interstate commerce in and of themselves.

In *Eureka Pipe Line Co.* v. *Hallanan*, No. 255, October Term, 1921, decided December 12, 1921, this court, speaking through Mr. Justice Holmes, said:

> So far as the oil that it calls for goes out of the State with the general current it seems to us not to be distinguishable from the rest admitted to move in interstate commerce. No bailor has title to any specific oil, and to deny the character of interstate commerce to the whole stream simply because some one might have called for a delivery that probably would have been made from it in an event that did not happen, is going too far.
>
> * * * * *
>
> As has been repeated many times, interstate commerce is a practical conception, and, as remarked by the court of first instance, a tax to be valid "must not in its practical effect and operation burden interstate commerce." It appears to us as a practical matter that the transmission of this stream of oil was interstate commerce from the beginning of the flow, and that it was none the less so that if different orders had been received by the pipe line it would have changed the destination upon which the oil was started and at which it in fact arrived. We repeat that the pipe line company not the producer was the master of the destination of any specific oil. Therefore its intent and action determined the character of the movement from its beginning, and neither the intent nor the direction of the movement changed.

In *United Fuel Gas Co.* v. *Hallanan*, No. 276, October Term, 1921, decided December 12, 1921, this court, speaking through Mr. Justice Holmes, said:

> In short the great body of the gas starts for points outside the State and goes to them. That the necessities of business require a much smaller amount destined to points within the State to be carried undistinguished in the same pipes does not affect the character of the major transportation. Neither is the case as to the gas sold to the three companies changed by the fact that the plaintiff, as owner of the gas, and the purchasers after they receive it might change their minds before the gas leaves the State and that the precise proportions between local and outside deliveries may not have been fixed, although they seem to have been. The typical and actual course of events marks the carriage of the greater part as commerce among the States and theoretical possibilities may be left out of account. . There is no break, no period of deliberation, but a steady flow ending as contemplated from the beginning beyond the State line. *Ohio R. R. Commission* v. *Worthington*, 225 U. S. 101, 108. *United States* v. *Reading Co.*, 226 U. S. 324, 367. *Western Union Telegraph Co.* v. *Foster*, 247 U. S. 105, 113. We have mentioned only such facts as are sufficient for our decision, and have not noticed other objections urged against the law. What we have stated seems to us enough to condemn it as applied to this case.

In *Dahnke-Walker Milling Co.* v. *Bondurant*, No. 30, October Term, 1921, decided December 12, 1921,

this court, citing the two foregoing cases, and speaking through Mr. Justice Van Devanter, said:

> The commerce clause of the Constitution, Article I, section 8, clause 3, expressly commits to Congress and impliedly withholds from the several States the power to regulate commerce among the latter. Such commerce is not confined to transportation from one State to another, but comprehends all commercial intercourse between different States and all the component parts of that intercourse. Where goods in one State are transported into another for purposes of sale the commerce does not end with the transportation, but embraces as well the sale of the goods after they reach their destination and while they are in the original packages. (*Brown* v. *Maryland*, 12 Wheat. 419, 446–447; *American Steel & Wire Co.* v. *Speed*, 192 U. S. 500, 519.) On the same principle, where goods are purchased in one State for transportation to another the commerce includes the purchase quite as much as it does the transportation. (*American Express Co.* v. *Iowa* 196 U. S. 133, 143.) This has been recognized in many decisions construing the commerce clause. Thus it was said in *Welton* v. *Missouri* (91 U. S. 275, 280): "'Commerce' is a term of the largest import. It comprehends intercourse for the purposes of trade in any and all its forms, including the transportation, purchase, sale, and exchange of commodities." In *Kidd* v. *Pearson* (128 U. S. 1, 20) it was tersely said: "Buying and selling and the transportation incidental there-

to constitute commerce." In *United States v. E. C. Knight Co.* (156 U. S. 1, 13) "contracts to buy, sell, or exchange goods to be transported among the several States" were declared "part of interstate trade or commerce." And in *Addyston Pipe & Steel Co. v. United States* (175 U. S. 211, 241) the court referred to the prior decisions as establishing that "interstate commerce consists of intercourse and traffic between the citizens or inhabitants of different States, and includes not only the transportation of persons and property and the navigation of public waters for that purpose, but also the purchase, sale, and exchange of commodities." In no case has the court made any distinction between buying and selling or between buying for transportation to another State and transporting for sale in another State. Quite to the contrary, the import of the decisions has been that if the transportation was incidental to buying or selling it was not material whether it came first or last.

* * * * *

There is no controversy about the facts bearing on the character of the transaction in question. It had been the practice of the plaintiff to go into Kentucky to purchase grain to be transported to and used in its mill in Tennessee. On different occasions it had purchased from the defendant—at one time 13,000 bushels of corn. This contract was made in continuance of that practice, the plaintiff intending to forward the grain to its mill as soon as the delivery was made. In keeping with that purpose the delivery was to

be on board the cars of a public carrier. Applying to these facts the principles before stated, we think the transaction was in interstate commerce. The state court, stressing the fact that the contract was made in Kentucky and was to be performed there, put aside the further facts that the delivery was to be on board the cars and that the plaintiff, in continuance of its prior practice, was purchasing the grain for shipment to its mill in Tennessee. We think the facts so neglected had a material bearing and should have been considered. They showed that what otherwise seemed an intrastate transaction was a part of interstate commerce. See *Swift and Co.* v. *United States*, 196 U. S. 375, 398; *Reading Co.* v. *United States*, 226 U. S. 324, 367; *Pennsylvania R. R. Co.* v. *Clark Brothers Coal Mining Co.*, 238 U. S. 456–468; *Eureka Pipe Line Co.* v. *Hallanan*, *supra*. The state court also attached some importance to the fact that after the grain was delivered on the cars the plaintiff might have changed its mind and have sold the grain at the place of delivery or have shipped it to another point in Kentucky. No doubt this was possible, but it also was improbable. With equal basis it could be said that a shipment of merchandise billed to a point beyond the State of its origin might be halted by the shipper in the exercise of the right of stoppage *in transitu* before it got out of that State. The essential character of the transaction as otherwise fixed is not changed by a mere possibility of that sort. See *United Fuel Gas Co.* v. *Hallanan*, *supra*.

In *Lemke, Attorney General,* v. *Farmers Grain Co.,* No. 456, October Term, 1921, decided February 27, 1922, Mr. Justice Day, citing *Swift & Co.* v. *United States,* and the three last foregoing cases, said:

> The record discloses that North Dakota is a great grain-growing State, producing annually large crops, particularly wheat, for transportation beyond its borders. Complainant, and other buyers of like character, are owners of elevators and purchasers of grain bought in North Dakota to be shipped to and sold at terminal markets in other States, the principal markets being at Minneapolis and Duluth. There is practically no market in North Dakota for the grain purchased by complainant. The Minneapolis prices are received at the elevator of the complainant from Minneapolis four times daily, and are posted for the information of those interested. To these figures the buyer adds the freight and his "spread," or margin, of profit. The purchases are generally made with the intention of shipping the grain to Minneapolis. The grain is placed in the elevator for shipment and loaded at once upon cars for shipment to Minneapolis and elsewhere outside the State of North Dakota. The producers know the basis upon which the grain is bought, but whoever pays the highest price gets the grain—Minneapolis, Duluth, or elsewhere. This method of purchasing, shipment, and sale is the general and usual course of business in the grain trade at the elevator of complainant and others similarly situated. The market for grain bought at Embden is

outside the State of North Dakota, and it is an unusual thing to get an offer from a point within the State. After the grain is loaded upon the cars it is generally consigned to a commission merchant at Minneapolis. At the terminal market the grain is inspected and graded by inspectors licensed under Federal law.

That such course of dealing constitutes interstate commerce, there can be no question. This court has so held in many cases, and we have had occasion to discuss and decide the nature of such commerce in a case closely analogous in its facts, and altogether so in principle, *Dahnke-Walker Milling Company* v. *Bondurant*, decided December 12, 1921. In that case the facts disclose that a company organized in Tennessee and carrying on business there, went into Kentucky and, through an agent there, bought wheat for shipment to the company's mill in Tennessee. The State court held that the transaction was merely a purchase of wheat in Kentucky, and made the Tennessee company amenable to the regulatory statutes of the State. This court rejected the conclusion of the State court, and held that the buying, no less than the selling of grain under such circumstances was a part of interstate commerce, committed to national control by the Federal Constitution. Applying the principle of that decision, and the previous decisions of this court cited in the opinion, the complainant's course of dealing in the buying of grain, which it purchased and sold under the circumstances as herein disclosed, was interstate commerce. Being such, the State could not regulate the business by a statute which had the

effect to control and burden interstate commerce.

Nor is this conclusion opposed by cases decided in this court and relied upon by appellants, in which we have had occasion to define the line between state and federal authority under facts presented which required a definition of interstate commerce where the right of state taxation was involved, or manufacture or commerce of an intrastate character was the subject of consideration. In those cases we have defined the beginning of interstate commerce as that time when goods begin their interstate journey by delivery to a carrier or otherwise, thus passing beyond state authority into the domain of federal control. Cases of that type are not in conflict with principles recognized as controlling here. None of them indicates, much less decides, that interstate commerce does not include the buying and selling of products for shipment beyond state lines. It is true, as appellants contend, that after the wheat was delivered at complainant's elevator, or loaded on the cars for shipment, it might have been diverted to a local market or sent to a local mill. But such was not the course of business. The testimony shows that practically all the wheat purchased by the complainant was for shipment to and sale in the Minneapolis market. That was the course of business, and fixed and determined the interstate character of the transactions. *Swift & Co.* v. *United States*, 196 U. S. 375; *Eureka Pipe Line Co.* v. *Hallanan*, decided by this court December 12, 1921; and *United Fuel Gas Company* v. *Hallanan*, decided the same day.

E. OTHER ACTIVITIES IRRELEVANT.

In No. 687 the counsel refer to the many businesses conducted in the Grand Central Terminal, New York (Br. 44), and in No. 691 the counsel refers to the waiter who serves, the bootblack who shines, the barber who shaves, in the Union Stock Yard, all as proper subjects of Congressional regulation if the opinion and decrees of the District Court are sound. None of these persons is engaged in the transportation of or the business of buying and selling "cattle, sheep, swine, horses, mules, or goats—whether live or dead," on a commission basis or otherwise; nor are these activities so inextricably interwoven into so as to become a part of the "current of commerce" referred to in the act; nor are these persons and activities mentioned in the act. These arguments are beside the point.

II.

THE CLASSIFICATION MADE IN THE ACT IS NOT ARBITRARY.

In No. 687 the counsel argue (Br. 45) that the language "This Title (Title III) is not applied to stockyards of which the area normally available for handling live stock, exclusive of runs, alleys, or passage ways, is less than 20,000 square feet," is an arbitrary classification which is in violation of the Fifth Amendment.

In *Wilson* v. *New* 243 U. S. 332, the so-called Adamson Act establishing "an eight-hour day for employees of carriers engaged in interstate com-

merce" (c. 436, 39 Stat. 721) excepts from its provisions "railroads independently owned and operated not exceeding 100 miles in length, electric street railroads, and electric interurban railroads." Because of the exceptions the act was assailed as making an arbitrary classification. Mr. Chief Justice White, in delivering the opinion of the court, said (p. 354):

> The want of equality is based upon two considerations. The one is the exemption of certain short line and electric railroads. We dismiss it because it has been adversely disposed of by many previous decisions. (Citing *Dow* v. *Beidelman*, 125 U. S. 680; *Chicago, Rock Island & Pacific Ry. Co.* v. *Arkansas*, 219 U. S. 453; *Omaha & Council Bluffs Street Ry.* v. *Interstate Commerce Commission*, 230 U. S. 324; *Chesapeake & Ohio Ry. Co.* v. *Conley*, 230 U. S. 513, 522–524; *St. Louis, Iron Mountain & Southern Ry. Co.* v. *Arkansas*, 240 U. S. 518.)

III.

THE PROVISIONS RELATING TO THE PROMULGATION OF RULES AND REGULATIONS BY THE SECRETARY OF AGRICULTURE, THE PUBLISHING AND FILING SCHEDULES SHOWING RATES AND CHARGES FOR SERVICES, ETC., HAVE PRECEDENT.

In No. 687 counsel argue that the "visitorial powers" conferred upon the Secretary invade the rights of appellants "to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures."

It is readily observable that the form of the legislation is taken from the Interstate Commerce Acts. Section 401, Title IV, provides:

> Every packer, stockyard owner, market agency, and dealer shall keep such accounts, records, and memoranda as fully and correctly disclose all transactions involved in his business, including the true ownership of such business by stockholding or otherwise.

Section 20 of the Act to Regulate Commerce (24 Stat. 379, 386; 34 Stat. 584, 593; 41 Stat. 456, 493) contains provisions for reports far more searching than any contained in this act. In *Interstate Commerce Commission* v. *Goodrich Transit Co.*, 224 U. S. 194, this court held that section 20 required water line carriers performing both interstate and intrastate commerce to render a report of *all* of their business to the Commission and, as so construed, was not beyond the power of Congress.

A commission merchant who falls within the classification of market agency is required (Sec. 303) to (a) register by giving to the Secretary his name and the character of his business, and the kind of stockyard service, if any, which he furnishes at such stockyard; (b) (Sec. 306) file a schedule of rates and charges; (c) (Sec. 401) keep an account of the business and disclose all transactions to the Secretary. All rates, charges, and services shall be just, reasonable, and nondiscriminatory. These are merely supervisory or regulatory powers which have precedent in the interstate commerce acts.

At this point it is noteworthy that the Congress adopted for and wrapped around the packers and stockyards act like a cloak the same court procedure for the enforcement or annulment of the orders of the Secretary as obtains for the enforcement or annulment of the orders of the Commission (Secs. 315, 316; see also House Committee Report, pp. 4–11).

Moreover, the court will not attempt to pass on the reasonableness of the rules and regulations of the Secretary of Agriculture, or to define his powers by a construction of the Act, in advance of a concrete case raising a specific issue, as in *Interstate Commerce Commission* v. *Goodrich Transit Co., supra; State of Texas* v. *Interstate Commerce Commission*, No. 24, Original, decided March 6, 1922.

IV.

CONCLUSION.

The decree of the District Court in each case should be affirmed.

JAMES M. BECK,
Solicitor General.
BLACKBURN ESTERLINE,
Special Assistant to the Attorney General.
BAYARD T. HAINER,
Attorney, Department of Agriculture.

MARCH 14, 1922.

○

THIS APPEAL INVOLVES THE CONSTITUTIONALITY OF THE "FEDERAL PACKERS AND STOCKYARDS ACT" AS APPLIED TO TRADERS, THAT IS, PERSONS WHO BUY AND SELL LIVE STOCK ON THEIR OWN ACCOUNT AFTER INTERSTATE COMMERCE THEREIN HAS ENDED.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1921.

No. 691

JAMES EUGENE BURTON, JAMES LOWELL COOK, JOHN HENRY KEINER, JR., JOHN WILLIAM KELLY, WILLIAM HENRY MOONEY, CHARLES LE ROY WAGNER AND WILLIAM LESLIE WALSH,

Appellants,

vs.

CHARLES F. CLYNE, UNITED STATES DISTRICT ATTORNEY FOR THE NORTHERN DISTRICT OF ILLINOIS,

Appellee.

APPEAL FROM AN ORDER OF THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS DENYING APPELLANTS' APPLICATION FOR A TEMPORARY INJUNCTION. HON. EVAN A. EVANS, CIRCUIT JUDGE, HON. KENESAW M. LANDIS, DISTRICT JUDGE, HON. LOUIS FITZHENRY, DISTRICT JUDGE, SITTING EN BANC.

BRIEF FOR APPELLANTS.

LEVY MAYER,
Counsel for Appellants.

March 7, 1922.

BURTHORP-WARREN PRINTING COMPANY, CHICAGO.

INDEX.

LIST OF AUTHORITIES.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1921.

No. 691.

JAMES EUGENE BURTON, ET AL.,
Appellants,

vs.

CHARLES F. CLYNE, UNITED STATES DISTRICT ATTORNEY, ETC.,
Appellee.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

BRIEF FOR APPELLANT.*

This appeal challenges the constitutionality of so much of the "Packers and Stock Yards Act, 1921," passed August 15, 1921 (hereinafter called Stock Yards Act) as affects "dealers." Title 3, Section 301, paragraph (d) of that Act provides that

> "The term 'dealer' means any person, *not a market agency,* engaged in the business of *buy-*

*The italics throughout this brief are ours.

> *ing or selling* in commerce live stock at a stockyard, either *on his own account* or as the employee or agent of the vendor or purchaser."

Paragraph (c) of the same section provides that

> "the term 'market agency' means any person engaged in the business of (1) *buying or selling* in commerce live stock at a stockyard *on a commission basis* or (2) furnishing stockyards service."

Thus the Stock Yards Act clearly differentiates between those (commission merchants) "buying or selling * * * on a commission basis" and "dealers" buying or selling "on their own account."

The appellants are private, nonincorporated individual dealers.

There is pending in this court (No. 687) the case of *Stafford, et al.* v. *Henry C. Wallace, Secretary of Agriculture, and Charles F. Clyne, United States District Attorney.* All of the appellants in the Stafford case are commission merchants; none of them buys or sells live stock on his own account. The appellants in this case are dealers who buy or sell exclusively on their own account and never buy or sell on a commission basis.

The opinion of the District Court was rendered by Judges Evans, Landis and FitzHenry December 20, 1921, in the Stafford case. (Rec., 21.) No opinion was filed in the present case other than the following:

> "For the reasons set forth in the memorandum filed in *Stafford et al.* v. *Wallace et al.*, the application for a temporary injunction is denied." (Rec., 21.)

The facts in this case are fundamentally different from those in the Stafford case, and the opinion rendered in that controversy, as we shall presently show, does not undertake to answer or dispose of the propositions upon which we rest. We contend that the provisions of the Stock Yards Act that affect dealers, violate Article I, Section 8, Clause 3 of the Constitution, which gives Congress power "to regulate commerce with foreign nations and among the several states and with the Indian Tribes," and the Tenth Amendment to the Constitution, by which "the powers not delegated to the United States by the Constitution nor prohibited by it to the states are reserved to the states respectively or to the people."

ASSIGNMENT OF ERRORS. (Rec., 27.)

1. That the lower court erred in refusing to issue a temporary injunction.

2. That the lower court erred in holding that the provisions of the Stock Yards Act that refer to dealers apply to appellants and are constitutional.

3. That said provisions violate the Commerce Clause of the Constitution.

STATEMENT OF THE CASE.

On November 28, 1921, appellants filed in the District Court at Chicago their Bill in Equity against Charles F. Clyne, District Attorney for the Northern District of Illinois, praying that certain provisions of the "Stock Yards Act" and certain rules and regulations promulgated by the Secretary of Agriculture thereunder, be declared unconstitutional and void, and that the District Attorney and his agents be enjoined from enforcing or attempting to enforce against appellants any of the penalties and forfeitures contained in the Stock Yards Act or in the rules and regulations of the Secretary, and also praying for a temporary injunction pending the final hearing of the cause. The facts alleged in the bill and admitted (Rec., 21) to be true by appellee's motion (Rec., 19) to dismiss are briefly these:

Appellants are seven private individuals who for periods varying from five to thirty-five years have been engaged as yard traders or dealers at the Chicago Stock Yards; during all that time they have exclusively either bought in the open market at said yards live stock from commission merchants and other dealers, or sold at said yards the live stock so purchased. Said stockyards is a public market and the live stock received there is shipped from points outside of and also within Illinois. Substantially all the live stock shipped to said yards is shipped on consignment to commission merchants who sell exclusively for a commission, and

none of said commission merchants buys or sells live stock for his own account. The live stock shipped to said yards is loaded at points of origin in live stock cars and is shipped under a shipping contract issued by the carriers, corresponding to a straight bill of lading. Promptly upon its arrival at the yards the live stock is unloaded from the cars onto chutes in the yards, and then and there by the stockyards company at once delivered to the commission merchants to whom the live stock has been consigned. The live stock is immediately driven from said chutes by the commission merchants to the pens in the yards that have been assigned to them for their use. The live stock is then in the exclusive possession, custody and control of the commission merchants and at their request, but at the cost of the consignors, is watered and fed by the stockyards company. With the delivery of the live stock to the commission merchants, its carriage and transportation have been ended and terminated. The commission merchants do not ship or transport any of the live stock. They have no part in or control over the disposition of the live stock sold by them. Not until some time after the delivery of the live stock to the commission merchants and not until after its carriage and transportation have completely terminated, does the business of appellants or other dealers at the stockyards begin.

Appellants are engaged in business exclusively for their own account. They never buy or sell on commission; they buy and sell only for their own benefit, and all gain or loss made in such transac-

tions belongs to or is sustained by appellants respectively.

The greater part of the live stock consigned to the commission merchants at said yards is shipped or delivered to them in carload or trainload lots, and a substantial part of the live stock is not graded or conditioned to meet the specific wants or requirements of particular buyers at the yards. A part of the live stock received by the commission merchants is sold by them to appellants and other dealers, who in turn separate, grade and classify the live stock and mix the same with like grades contained in other purchases made by them, respectively.

Appellants buy in open competition with all other buyers at the yards and all purchases made by appellants are made for the sole purpose of reselling the same at said yards to dealers and other purchasers there doing business. The live stock purchased by appellants at the yards is purchased by them only from the commission merchants or from other yard dealers, and after such purchase is at once delivered by the sellers to appellants at the yards and placed in pens assigned by the stockyards company for the use of appellants. Immediately upon its purchase by appellants, the live stock is weighed out to them upon the scales of the stockyards and at once paid for by appellants to the sellers in accordance with said scale weights. *In the purchase or sale of live stock by appellants, there is no transportation or carriage of any kind directly or indirectly involved. The transportation and*

transit of the live stock has long prior thereto terminated and is not again initiated by appellants.

The live stock purchased by appellants and other dealers is sold by them as promptly as possible. There is no continuity of movement in interstate commerce, of said live stock through said yards, but the continuity of movement has completely ceased and terminated long before appellants make their purchases. There is no transportation whatever of the live stock purchased by appellants, between any point in Illinois and any point without Illinois, nor between any two points within Illinois, but the carriage and transportation of the live stock has theretofore completely terminated and is not resumed by any act of appellants. The title to the live stock purchased by appellants vests at once in appellants and frequently the live stock remains in their exclusive possession for several days, awaiting an opportunity for advantageous sale. During all of this time the live stock is fed and watered by the stockyards company at the expense of appellants. The delivery of and title to all such purchases passes at said yards to the purchasers from appellants immediately appellants sell the live stock. Appellants never act as consignors or consignees and never ship or transport, and never cause to be shipped or transported any live stock.

The Secretary of Agriculture insists that the Stock Yards Act applies to these appellants and all dealers at said yards, and that they are subject to the Stock Yards Act and the rules and regulations promulgated thereunder by the

Secretary. The Secretary has heretofore declared said stockyards to be subject to the Stock Yards Act and on November 21, 1921, gave notice accordingly and posted copies of such notice in said yards, and on said date the Secretary declared and gave public notice that appellants and no other dealers at said yards will be permitted to carry on business unless they have registered with the Secretary under the rules and regulations promulgated by him.

Section 303 of the Stock Yards Act provides that if any dealer carries on his business before he is registered with the Secretary, such dealer shall be liable to a penalty of not more than $500 for each offense and not more than $25 for each day the offense continues. The Act further provides that every dealer shall keep such accounts, records and memoranda as accurately disclose all transactions involved in his business, and under the rules and regulations promulgated by the Secretary every registered dealer is required to make to the Secretary reports giving such information concerning the business of the dealer, as the Secretary may require, and each registered dealer is required to permit any representative of the Secretary to enter his place of business and inspect any and all property in his possession or control and all records pertaining to his business. And no registered dealer is permitted to destroy any of his books, records, documents or papers which contain or explain the accounts of his business, without the written consent of the Secretary. By the Stock Yards Act it is further provided

that if any dealer fails to keep accounts, records and memoranda as required, or fails to keep such accounts, records and memoranda in the manner and form approved by the Secretary, such dealer shall, upon conviction be fined up to $5,000, or imprisoned not more than three years, or both.

District Attorney Clyne threatened to at once enforce all of the penalties and forfeitures provided in the Stock Yards Act, and intends to and will prosecute the various proceedings and suits prescribed in the Act, against appellants and all other dealers, unless he be restrained and enjoined as prayed in the bill.

The bill alleges that subdivision (b) of paragraph 6 of Section 2, subdivision (d) of Section 301, Section 303, subdivision (a) of Section 308, subdivisions (a) and (b) of Section 312, subdivisions (a) and (b) of Section 314, Sections 315, 401 and 403 of said Act, and the said rules and regulations promulgated by the Secretary are unconstitutional and void.

On December 2, 1921, District Attorney Clyne moved (Rec., 19) to dismiss the bill. This motion was in effect a demurrer and asked for a dismissal for want of jurisdiction of the defendant and the subject matter, for want of equity, and because the bill seeks to enjoin enforcement of a constitutional Act of Congress and seeks to restrain the enforcement of a criminal statute.

The Decision of the Lower Court.

In its opinion the lower court (Rec., 22) says:

> "But the question recurs: when does the interstate shipment end? Does the handling of the stock by the live stock dealers and the live stock commission men in the stockyards commence after the interstate shipment is ended, *or are they instrumentalities* operating *within* one of the instrumentalities of interstate commerce?"

And again (Rec., 23):

> "Are stockyards, which are nothing more than mere live stock depots into and through which the current of interstate commerce flows, instrumentalities of interstate commerce? The answer must be in the affirmative. * * *
>
> When once we consider that the stockyards themselves are instrumentalities of interstate commerce, then, the conclusion is irresistible that the regulatory powers of Congress apply to those engaged in or participating in that commerce within the stockyards and we think that the Supreme Court in *Swift* v. *United States, supra,* meant to cover this situation. * * *"

The decision rests upon the following premise:

> "The stockyards themselves are instrumentalities of interstate commerce," and

the dealers in live stock at the yards are "engaged in or participating in that commerce within the stockyards." *Ergo,* the dealers are engaged in interstate commerce and subject to the regulatory power of Congress.

We submit that both premise and conclusion are wrong. The dealers are not engaged in "commerce within the stockyards."

A cranberry grower on Cape Cod ships cranberries from his Massachusetts bog to a commission merchant in New York City, who has a stall in a public market which is conducted on and is a part of the terminal facilities of the carrier. The berries are delivered by the carrier to the consignee, who receives the berries as a commission merchant only, and is paid a commission for selling the berries. He deducts his commission and the freight he has advanced to the carrier, and remits the balance to the grower. The commission merchant sells and delivers the cranberries to jobbers or wholesalers ("dealers") in New York City. The latter sell the berries to hotels and retail grocers, who in turn sell the berries to the housewife. By the reasoning of the lower court, the purchaser of the berries from the commission merchant is engaged in interstate commerce and the one to whom the purchaser resells is likewise so engaged.

If the logic of the lower court be correct and dealers are instrumentalities of interstate commerce because they do business at the stockyards, then the cook and waiter at the stockyards hotel, the men who sell the food that is served at the hotel, or who sell the grain that is fed to the live stock, the bootblack who shines the shoes of the dealer, the newsboy who sells him papers, the barber who shaves him, the workmen who clean the pens—they all do business at the yards—are engaged in interstate commerce and are subject to Congressional regulation and control. The fact (if it be a fact) that stockyards are "instrumentalities of interstate commerce" does not make

dealers or others doing business at the yards instrumentalities of interstate commerce. We do not read the decisions of this court in *U. S.* v. *Union Stock Yards and Transit Co. of Chicago,* 226 U. S. 286, and *Covington Stock Yards* v. *Keith,* 139 U. S. 128, as holding that stockyards in all their divisions and ramifications are "instrumentalities of interstate commerce." Very many services that the stockyards companies render at their yards are distinct from and not at all such as fall within the Commerce Clause of the Constitution

In *Pennsylvania R. R. Co.* v. *Knight,* 192 U. S. 21, the Pennsylvania Company maintained a cab service to take passengers to and from its terminus in the City of New York, for which it made separate charges. The cabs were used *only* by persons going to or coming from the State of New Jersey by the company's ferry. This court held that the cab service was not interstate commerce, and was subject to the control of the State of New York. At page 28 this court says:

> "As shown in the opinion (*The Daniel Ball,* 10 Wall. 557, 565), from which we have just quoted, many things have more or less close relation to interstate commerce which are not properly to be regarded as a part of it. If the cab which carries the passengers from the hotel to the ferry landing is engaged in interstate transportation, why is not the porter who carries the traveler's trunk from his room to the carriage also so engaged. If the cab service is interstate transportation, are the drivers of the cabs, and the dealers who supply hay and grain for the horses,

> also engaged in interstate commerce. And where will the limit be placed?"

The lower court rests its opinion upon *Swift & Co.* v. *U. S.* 196 U. S. 375, and *Dahnke-Walker Milling Co.* v. *Bondurant*, not yet officially reported, decided December 12, 1921, Volume 42, No. 5, January 15, 1922, Supreme Court Rep. p. 106.

We submit that neither of these cases applies to the present issue. In the Dahnke case this court quotes approvingly from *Kidd* v. *Pearson*, 128 U. S. 1, as follows:

> "Buying and selling *and the transportation incidental thereto* constitute commerce."

In the present case the undisputed facts show that transportation is neither directly, indirectly nor incidentally connected with the buying or selling of live stock by the dealers. They do not ship, and have nothing whatever to do with, and are in no way concerned in shipping or transporting any live stock. Further on in the Dahnke case this court says:

> "In no case has the court made any distinction between buying and selling or between buying for transportation to another state and transporting for sale in another state. Quite to the contrary, *the import of the decisions has been that if the transportation was incidental to buying or selling*, it was not material whether it came first or last."

The Dahnke case involved the purchase by a Tennessee corporation of wheat in Kentucky for delivery on board cars at a point in Kentucky, to be shipped to the mill in Tennessee of the Tennessee corporation. This court holds that where the buyer in continuance of its earlier practice, was purchas-

ing the grain in Kentucky for shipment to the buyer's mill in Tennessee, this constituted interstate commerce.

The Swift case is not applicable. The lower court picks out from the body of the opinion of this court a sentence which is descriptive of only one link in the entire scheme which was condemned by this court. At p. 396 of the Swift case this court says:

> "The scheme as a whole seems to us to be within reach of the law. The constituent elements, as we have stated them, are enough to give to the scheme a body, and for all that we can say, to accomplish it. Moreover, whatever we may think of them separately, when we take them up as distinct charges, they are alleged sufficiently as elements of the scheme. It is suggested that the several acts charged are lawful and that the intent can make no difference, but *they are bound together as the parts of a single plan. The plan may make the parts unlawful.*"

Furthermore, this court did not modify the doctrine established in *Hopkins* v. *U. S.* 171 U. S. 578, or in *Anderson* v. *U. S.* 171 U. S. 604. (See p. 397.)

In fact, in *Blumenstock* v. *Curtis Publishing Co.* 252 U. S. 436, decided as late as April 19, 1920, this court says at p. 443:

> "We held in *Hopkins* v. *U. S.* 171 U. S. 579, that the buying and selling of live stock in the stockyards of a city by members of the stock exchange, was not interstate commerce, although most of the live stock was sent from other states."

Appellants Are Not Engaged in Interstate Commerce, and Therefore Those Parts of the Stock Yards Act Which Seek to Control and Regulate Their Business Are Unconstitutional.

Appellants and other dealers purchase live stock at the yards after the live stock has been there delivered, and after its transportation has entirely terminated and ceased. At the time of the purchase interstate and intrastate carriage of the live stock has wholly terminated. The live stock is not consigned or shipped from points out of the state to the appellants or other dealers. The live stock is not shipped or transported to or by them at all. When appellants purchase the live stock, it is no longer in course of shipment or transportation. It is a part of the general mass of property in the state. Appellants and other dealers do not sell for shipment or transportation, and do not themselves ship or transport. Delivery of the live stock is made to them at the yards, and when they sell, they make immediate delivery to the purchasers at the yards.

The controlling rule is exhaustively stated by Judge Jackson—afterwards a member of this court—at Circuit, in *In re Greene*, 52 Fed. 104. He says (p. 113):

> "Commerce among the states within the exclusive regulating power of Congress 'consists of intercourse and traffic between their citizens, and includes the transportation of persons and property, as well as the purchase, sale, and exchange of commodities' (citing cases). In the application of this comprehensive definition, it is

settled by the decisions of the Supreme Court that such commerce includes not only the actual transportation of commodities and persons between the states, but also the instrumentalities and processes of such transportation. That it includes all the negotiations and contracts which have for their object or involve as an element thereof such transmission or passage from one state to another; that such commerce begins, and the regulating power of Congress attaches, when the commodity or thing traded in commences its transportation from the state of its production or situs to some other state or foreign country, and *terminates* when the transportation is completed, and the property has become a part of the general mass of the property in the state of its destination. When the commerce begins is determined * * * by its actual delivery to a common carrier for transportation, or the actual commencement of its transfer to another state. At that time the power and regulating authority of the state ceases, and that of Congress attaches, and continues until it has reached another state and become mingled with the general mass of property in the latter state. * * * *After the termination of the transportation* of commodities or articles of traffic from one state to another, and the mingling or merging thereof in the general mass of property in the state of destination, the sale, distribution, and consumption thereof in the latter state forms no part of interstate commerce."

After the live stock has been delivered to the dealers it is merged into the general mass of property in the state and becomes subject to local taxation. Most frequently the live stock is graded, classified and mixed with other live stock belonging to the dealers.

In re Greene, supra, has been approvingly cited by

this court in *Hammer* v. *Dagenhart,* 247 U. S. 251, at page 272. See, also, the dissenting opinion of Mr. Justice WHITE, concurred in by the Chief Justice and two other justices, at page 384, in *Northern Securities Co.* v. *U. S.* 193 U. S. 197.

In *Blumenstock Bros.* v. *Curtis Publishing Co.* 252 U. S. 436, this court holds that a business conducted by an advertising agency, of placing, by contracts with publishers, advertisements in magazines which are published and distributed throughout the United States, is not interstate commerce, although the circulation and distribution of the publication themselves be such. The court, at p. 442, says:

> "*The advertising contracts did not involve any movement of goods or merchandise in interstate commerce,* or any transmission of intelligence in such commerce."

Like language was used in *Ware & Leland* v. *Mobile County,* 209 U. S. 405; and the doctrine of that case is approved in the *Blumenstock Bros.* case, at page 443, where this court, speaking of the Ware & Leland case, says:

> "We held (there) that brokers taking orders, and transmitting them to other states, for the purchase and sale of grain or cotton upon speculation, were not engaged in interstate commerce; that such contracts for sale or purchase *did not necessarily result in any movement of commodities in interstate traffic,* and the contracts were not therefore the subjects of interstate commerce."

So, also, this court held the same way in *U. S. Fidelity & Guaranty Co.* v. *Kentucky,* 231 U. S. 394, also cited in the *Blumenstock Bros.* case, at page 443.

In *Wagner* v. *City of Covington,* 251 U. S. 95, a manufacturer of merchandise in Ohio caused his products to be carried on vehicles from Ohio to various establishments of retail dealers who were his customers in Kentucky, and there sold and delivered to such dealers in original packages, in such quantities as the dealers desired to purchase at the times that such purchasers were visited by the agents of the manufacturer. This court says, at page 103:

> "Of course, the transportation of plaintiffs' goods across the state line is, of itself, interstate commerce; but it is not this that is taxed by the City of Covington (Kentucky), nor is such commerce a part of the business that is taxed, nor anything more than a preparation for it. So far as the itinerant vending is concerned, the goods might just as well have been manufactured within the State of Kentucky; to the extent that plaintiffs dispose of their goods in that kind of sales, they make them the subject of local commerce; and, this being so, they can claim no immunity from local regulations, whether the goods remain in original packages, or not."

Danciger v. *Cooley,* 248 U. S. 319, involved the question whether the transportation of liquor from Missouri into Kansas had come to an end so as to make the federal statute inapplicable. At page 324 the court says:

> "Where the transactions were real, and not merely colorable, the business so conducted was lawful interstate commerce, and entitled to protection as such until the sale and transportation were consummated *by the delivery of the liquor to the vendee at the point of destination.*"

And at page 327:

> "Transportation, as this court often has said,

> is not completed until the shipment arrives at the point of destination, *and is there delivered,"*

citing several cases.

The court made the question of actual delivery the controlling factor, and held that until there had been such delivery, the federal statutes applied.

And so, in *Chicago, Milwaukee & St. Paul Ry. Co.* v. *Iowa,* 233 U. S. 334, this court says, at page 343:

> "But the fact that commodities received on interstate shipments are reshipped by the consignees in the cars in which they are received, to other points of destination, does not necessarily establish a continuity of movement, or prevent the reshipment to a point within the same state from having an independent and intrastate character." (Citing cases.)

And in *Bacon* v. *Illinois,* 227 U. S. 504, this court held, to quote from the syllabus:

> "Property brought from another state and withdrawn from the carrier and held by the owner with full power of disposition, becomes subject to the local taxing power, notwithstanding the owner may intend to ultimately forward it to a destination beyond the state."

In *Gulf, Colorado & Santa Fe Ry. Co.* v. *Texas,* 204 U. S. 403, the facts were these: Corn was carried by the railway company from Texarkana, Texas, to Goldthwaite, Texas, on a local bill of lading. It was contended by the railway company that the local transportation was a continuation of the shipment from South Dakota to Texarkana; that the place from which the corn started was Hudson, South Dakota, and the place at which the transporta-

tion ended was Goldthwaite, Texas. This court says (p. 412):

> "When the Harden Company accepted the corn at Texarkana, the transportation contracted for ended. * * * (413) Whatever may have been the thought or purpose of the Harden Company in respect to the further disposition of the corn, was a matter immaterial so far as the completed transportation was concerned."

In *Hopkins* v. *U. S.* 171 U. S. 578, live stock commission merchants, doing business at the Kansas City Stockyards, received consignments of live stock from owners who shipped the same from points outside the state, and, as consignees, sold the live stock for a commission, and, after deducting their charges and advances, remitted the proceeds to the owners. This court held that the business or occupation of the commission merchants was not interstate commerce. The principles established in that case not only dispose of the issue in *Stafford* v. *Wallace,* No. 687 in this court, but are still more decisive of the rule in the present case. See particularly the language of this court in the *Hopkins* case at pages 587 to 592. At page 600 this court says:

> "The Act of Congress must have a reasonable construction, or else there would scarcely be an agreement or contract among business men that could not be said to have indirectly or remotely some bearing upon interstate commerce, and possibly to restrain it."

See, also, the reasoning of Mr. Justice PECKHAM, in the opinion of this court, rendered in *Anderson* v. *U. S.* 171 U. S. 604.

The opinion of this court in the *Hopkins* case an-

swers and disposes of not only the hypothetical illustrations of the lower court in this case, but also many other assumed or imaginary illustrations. The conclusion of this court in the *Hopkins* case, and in other cases, has been (p. 594) that:

> "An agreement may in a variety of ways affect interstate commerce just as state legislation may, and yet, like it, be entirely valid because the interference effected by the agreement or by the legislature is not direct."

In the recent case of *Winslow* v. *Federal Trade Commission,* decided November 1, 1921, by the Circuit Court of Appeals of the Fourth Circuit (Federal Trade Commission Service, 2nd Ed. p. 637), the facts were these: Winslow *et al.* were shipchandlers, having their principal place of business in Norfolk and Newport News, Virginia. In these places they kept in stock and sold, to ships coming to those ports, ship supplies, which were carried and used in foreign commerce. Ninety per cent of their business was with English ships. Deliveries were made by launches from their warehouses to ships lying at anchor in Hampton Roads, Virginia. After delivery had been made of the supplies on board, and paid for, Winslow *et al.* gave the ship captains gratuities. The Federal Trade Commission held these gratuities to be unfair competition, and directed their discontinuance. Says the court:

> "The claim that they (Winslow *et al.*) were engaged in interstate commerce, rests wholly on the fact that the commodities in which they dealt are in large part transported into Virginia from other states in which they are procured. But this transportation ends when the goods reach

> their destination, and are placed in petitioner's warehouses in Norfolk and Newport News. * * * Their subsequent sale and delivery within that state, with which alone the condemned practices are connected, is in no sense interstate commerce. In short, it is quite beyond doubt that the jurisdiction of the Commission over the matter in hand cannot be supported by the prior and independent and completed transportation of the goods, or some part of them, from another state." (Citing, among other cases, *Brown* v. *Houston,* 114 U. S. 622; *Robbins* v. *Taxing District,* 120 U. S. 489, 497; *Wagner* v. *Covington,* 251 U. S. 95.)

In *Ward Baking Co.* v. *Federal Trade Commission,* 264 Fed. 330 (2d C. C. A.), the Baking Co. had a plant at Cambridge, Massachusetts. It transported bread in its own wagons across the state line of Massachusetts into Rhode Island. Its wagons called at several retail stores in Rhode Island, and the wagon drivers delivered to these storekeepers additional bread gratis. The Trade Commission declared the practice unfair, and as resulting in suppressing competition in interstate commerce. The court quotes at length from the decision of this court in *Wagner* v. *City of Covington, supra,* and says:

> "Doubtless bread sold in Massachusetts to be delivered to the purchaser in Rhode Island would be interstate commerce, but that is not this case. Moreover, the Commission is not finding the act of transportation from Massachusetts to Rhode Island unfair, but the method of local sales made in Rhode Island. If the respondent had its own stores in Rhode Island, and carried to them from Massachusetts bread to be there sold, this method of selling could not be considered interstate commerce."

It is submitted that the Commerce Clause of the Constitution has been stretched by Congress far beyond the meaning of the Clause as interpreted by this court. First by insidious approaches, and then by open and defiant encroachments, Congress has, under the cloak of this Clause, been absorbing powers which the Tenth Amendment guaranties to the states. To paraphrase the language of this court in *Hooper* v. *California*, 155 U. S. 648, at page 655: If Congress can apply the power to regulate interstate commerce to all the incidents connected with that commerce, that power will soon embrace the entire sphere of mercantile activity in any way connected with trade between the states, and will soon exclude state control over contracts and commerce that are purely domestic in their nature.

We pray that the decision of the lower court be reversed, with directions to issue a temporary injunction, as prayed in the bill.

Respectfully submitted,

LEVY MAYER,
Counsel for Appellants.

CHICAGO, March 7, 1922.

THIS APPEAL INVOLVES THE CONSTITUTIONALITY OF THE "FEDERAL PACKERS AND STOCKYARDS ACT" AS APPLIED TO TRADERS, THAT IS, PERSONS WHO BUY AND SELL LIVE STOCK ON THEIR OWN ACCOUNT AFTER INTERSTATE COMMERCE THEREIN HAS ENDED.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1921.

No. 691

JAMES EUGENE BURTON, JAMES LOWELL COOK, JOHN HENRY KEINER, JR., JOHN WILLIAM KELLY, WILLIAM HENRY MOONEY, CHARLES LE ROY WAGNER AND WILLIAM LESLIE WALSH,

Appellants,

vs.

CHARLES F. CLYNE, UNITED STATES DISTRICT ATTORNEY FOR THE NORTHERN DISTRICT OF ILLINOIS.

Appellee.

APPEAL FROM AN ORDER OF THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS DENYING APPELLANTS' APPLICATION FOR A TEMPORARY INJUNCTION. HON. EVAN A. EVANS, CIRCUIT JUDGE, HON. KENESAW M. LANDIS, DISTRICT JUDGE, HON. LOUIS FITZHENRY, DISTRICT JUDGE, SITTING EN BANC.

MOTIONS TO ADVANCE THE CAUSE AND FOR A RESTRAINING ORDER PENDING THE APPEAL AND SUGGESTIONS IN SUPPORT THEREOF.

LEVY MAYER,
Solicitor for Appellants.

January 13, 1922.

GUNTHORP-WARREN PRINTING COMPANY, CHICAGO.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1921.

No.

JAMES EUGENE BURTON, JAMES LOWELL COOK, JOHN HENRY KEINER, JR., JOHN WILLIAM KELLY, WILLIAM HENRY MOONEY, CHARLES LE ROY WAGNER AND WILLIAM LESLIE WALSH,

Appellants,

vs.

CHARLES F. CLYNE, UNITED STATES DISTRICT ATTORNEY FOR THE NORTHERN DISTRICT OF ILLINOIS.

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MOTIONS TO ADVANCE THE CAUSE AND FOR A RESTRAINING ORDER PENDING THE APPEAL AND SUGGESTIONS IN SUPPORT THEREOF.

Now come the appellants, by Levy Mayer, their solicitor, and move the court that the above entitled cause be advanced and specially set for hearing, and that during the pendency of the said cause in this court and for twenty days after final judgment herein the appellee, Charles F. Clyne, United States District Attorney for the Northern District of Illinois, be restrained from

in any manner enforcing or attempting to enforce against the appellants, their agents, servants and employees, or any of them, any of the pains, penalties and forfeitures provided in the Act of Congress approved August 15, 1921, entitled "An Act to regulate interstate and foreign commerce in live stock, live stock products, dairy products, poultry, poultry products and eggs and for other purposes," or for or on account of the alleged violation of any rule or regulation of the Secretary of Agriculture now promulgated or that may hereafter be promulgated under authority thereof, and from arresting or prosecuting or from attempting to arrest or prosecute or causing to be arrested or prosecuted the appellants, their agents, servants and employees or any of them for or on account of any alleged violation by them or any of them of any of the provisions of said act or any of the rules or regulations of the Secretary of Agriculture promulgated or that may hereafter be promulgated under the authority thereof, and in support of said motions to advance and for a restraining order, the appellants submit the suggestions filed herewith.

LEVY MAYER,
Solicitor for Appellants.

CHICAGO, January 13, 1922.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1921.

No.

JAMES EUGENE BURTON, JAMES LOWELL COOK, JOHN HENRY KEINER, JR., JOHN WILLIAM KELLY, WILLIAM HENRY MOONEY, CHARLES LE ROY WAGNER AND WILLIAM LESLIE WALSH,

Appellants,

vs.

CHARLES F. CLYNE, UNITED STATES DISTRICT ATTORNEY FOR THE NORTHERN DISTRICT OF ILLINOIS.

Appellee.

APPEAL FROM AN ORDER OF THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS DENYING APPELLANTS' APPLICATION FOR A TEMPORARY INJUNCTION. HON. EVAN A. EVANS, CIRCUIT JUDGE, HON. KENESAW M. LANDIS, DISTRICT JUDGE, HON. LOUIS FITZHENRY, DISTRICT JUDGE, SITTING EN BANC.

SUGGESTIONS IN SUPPORT OF MOTIONS TO ADVANCE THE CAUSE AND FOR A RESTRAINING ORDER PENDING THE APPEAL.

This appeal is from an order of the District Court of the United States for the Northern District of Illinois, denying the motion of the appellants, who are live stock traders at the Chicago Union Stock Yards, for a preliminary injunction to restrain the appellee, United States District Attorney for that District, from enforcing as against the appellants the provisions of the Act of Congress of August 15, 1921, hereinafter referred to as the

Stock Yards Act, or rules or regulations promulgated thereunder.

The motion for preliminary injunction was heard in the court below December 2, 1921, by three judges, and the appeal from the interlocutory order, denying the application was taken to this court because the Stock Yards Act provides (Sec. 316) that

> "For the purposes of this title (involved in this case) the provisions of all laws relating to the suspending or restraining the enforcement, operation or execution of or the setting aside in whole or in part the orders of the Interstate Commerce Commision are made applicable to the jurisdiction, powers and duties of the Secretary (of Agriculture) in enforcing the provisions of this title and to any person subject to the provisions of this title,"

thus making the practice in cases like the one at bar follow that provided in the Act of October 22, 1913 (38 Stat. 220.)

The appellants are traders or dealers who are engaged in the business of buying and selling cattle on their own account after the arrival and delivery of the cattle to the original consignees at the Union Stock Yards of Chicago.

The Stock Yards Act purports to give the Secretary of Agriculture power to prescribe various regulations for governing the business of appellants and undertakes to compel them to keep certain prescribed forms of accounts, records and memoranda, to make various reports, to register with the Secretary of Agriculture and to permit his representatives to visit their places of business and to inspect all property and records in their possession. The act imposes a penalty of not more than $500 for each violation of the rules and regulations prescribed by the Secretary of Agriculture and of not more than $25 for each day the offense continues, and

failure to keep records in the manner prescribed by the Secretary under certain conditions subjects the trader to a fine of up to $5,000 or imprisonment for not more than three years, or both.

To enjoin the enforcement of this act, the appellants on November 28, 1921, filed their verified bill of complaint on their own behalf and on behalf of all other persons doing business similar to theirs, at the Chicago Union Stock Yards.

The bill is based upon the claim that appellants are not engaged in interstate commerce, and that therefore the Stock Yards Act, in so far as it regulates their business or gives the Secretary of Agriculture power to do so, is unconstitutional.

The application for a preliminary injunction was made on November 29, 1921 (Rec., 18). This application which was supported by the verified bill of complaint was denied on December 29, 1921 (Rec., 25-26) in accordance with an opinion rendered by the District Court and filed December 20, 1921 (Rec., 21).

The bill (Rec., 3-17) alleges that the Chicago Union Stock Yards is a public market; that its area is over 400 acres; that the Stock Yards Company operates over 300 miles of railroad track in said yards; that the yards are the largest in the world; that in 1920 over 15,000,000 head of cattle of all descriptions, of a value of more than $665,000,000 were received and handled there; that the number of live stock received and handled during 1921 would be approximately the same, and the value thereof over $500,000,000; that practically all the live stock received at the stockyards is shipped on consignment to commission merchants who sell the same for a commission and not on their own account; that the live stock sold by the commission merchants is sold to packing houses located

at the stockyards, or to purchasers having packing houses located outside of the State of Illinois, or to purchasers who buy the live stock for purposes of feeding and fattening the same, or to the appellants and other yard traders or dealers.

The bill avers that all the live stock coming into the Union Stock Yards is consigned to commission merchants by straight bills of lading; that the commission merchants do not purchase any part of the live stock, do not transport the same, nor have they any control whatsoever over the disposition of any of the live stock sold by them; that *not until after* delivery of said live stock to the commission merchants and *not until after* the carriage and transportation of said live stock *has completely terminated* does the business of the appellants or other yard traders begin; that these appellants and the other yard traders are engaged in business on their own account, that they do not buy or sell on commission, and all gain or loss in their transactions belongs to or is sustained by them, respectively; that appellants do a large annual business, one of them approximately $4,000,000 a year, and none of them less than $175,000 a year; that the live stock after being sold to appellants and the other yard traders is delivered to pens especially assigned to apellants by the Stock Yards Company; that appellants and the other traders sell the live stock bought by them as promptly as possible to other traders or dealers or buyers for local consumption or to buyers who buy for feeding purposes, and that only a very small percentage of the live stock is sold by traders to buyers who buy on orders for persons located either in or outside of the State of Illinois; that there is no continuity of movement in interstate commerce of said live stock through the stockyards, but that such continuity of movement has completely ceased and terminated when such

live stock has been delivered to the commission merchants; that the title to the live stock purchased by appellants and the other traders remains in them until resale; that they sometimes keep the live stock several days at the yards waiting for a chance to sell; that where live stock is purchased by persons contemplating shipment of the same outside of the State of Illinois, the appellants and the other dealers have nothing whatever to do with the transportation or shipment of such purchases; that the title in such purchases passes immediately to the purchasers after the appellants and other yards traders have sold the live stock at the yards to the purchasers at the yards; that appellants all belong to the Traders' Live Stock Exchange of Chicago, which consists of 528 members in good standing, all of whom are yard traders or dealers in live stock at said stockyards, either as principals or employees. There are 2,000 such traders or dealers at the various stockyards in the United States.

Under the provisions of the Stock Yards Act (Sec. 301) it does not purport to become effective with respect to any particular stockyards until the Secretary of Agriculture has so declared it.

The bill avers that such a declaration was made by the Secretary with respect to the Chicago Union Stock Yards on or about November 1, 1921, and that he has prescribed rules for the conduct of the appellants' business thereat, and that under the Stock Yards Act appellants cannot carry on business there unless they register under the law. The bill then shows that if the act and regulations are enforced against the members of the Traders' Live Stock Exchange, they would be subject to a penalty of $264,000 for the first day that the act became effective at said yards (that is, if they did not comply therewith), and if imposed upon all the members of the National

Traders' Exchange the penalty would exceed $750,000 for the first day.

The bill then charges that the Stock Yards Act is an attempt to regulate commerce that is wholly and exclusively local and intrastate and is not a regulation of interstate commerce; that it violates Article 1, Section 8, Clause 3 of the Constitution which gives Congress power to "regulate commerce with foreign nations, and among the several states and with the Indian Tribes"; that it violates the rights of the appellants under the Fourth Amendment to be "secure in their person, house, papers and effects against unreasonable search and seizures," and that it violates the Fifth Amendment in that it deprives the plaintiffs of life, liberty and property without due process of law; the Eighth Amendment in that it imposes cruel and unusual punishments, and the Tenth Amendment in that it is an exercise by Congress of a power not delegated to the United States, but reserved to the states.

To adopt the language of Mr. Chief Justice White in delivering the opinion of this court in *Kennington* v. *Palmer*, 255 U. S. 100, where a bill was brought by certain dealers in wearing apparel to restrain the Attorney General and his subordinates from enforcing Section 4 of the Lever Act:

> "It is no longer open to deny that the averments of unconstitutionality which are relied upon if well founded justify equitable relief under the bill. (*Wilson* v. *New*, 243 U. S. 332; *Adams* v. *Tanner*, 244 U. S. 590; *Hammer* v. *Dagenhart*, 247 U. S. 251; *Hamilton* v. *Kentucky Distilleries Co.* 251 U. S. 146; *Ruppert* v. *Caffey*. 251 U. S. 264; *Ft. Smith & Western R. R. Co.* v. *Mills*, 253 U. S. 206.)"

Summarized and reduced to a simple proposition, the record in this case presents no disputed question of fact and only one controverted proposition of law. The facts

averred in the bill are not disputed and, for the purposes of this record, are admitted by the Government to be true. The facts are these: Two thousand traders or dealers in live stock (the appellants being seven of that number) buy and sell live stock at the various stockyards in the United States. They buy and sell *exclusively for and on their own account* and *not* as commission merchants, brokers or agents. They buy the live stock at the yards; they sell it at the yards to purchasers at the yards. They buy the live stock from the commission merchants at the yards to whom the live stock has been originally consigned, or they buy the live stock from other dealers or traders at the yards who have theretofore bought the live stock from the commission merchants. The traders or dealers have not the remotest connection with or concern about the transportation of the live stock either to or from the yards. When the appellants and other traders and dealers purchase the live stock, the same has already been received at the yards and delivered to the commission merchants or original consignees, who have theretofore taken possession of the live stock and fed and watered it; the transportation has *completely ceased* when the live stock has been received at the yards and delivered to the commission merchants.

The appellants and the other traders and dealers buy the live stock at one price for the purpose of selling it at a profit. Frequently they lose in the transaction. The appellants and the other traders and dealers have nothing whatever to do with the transportation of the live stock. After the traders and dealers have purchased the live stock it is immediately delivered to them at the yards, the delivery being made either by the original commission merchants or consignees or by the intervening traders or dealers who have theretofore purchased the live stock at the yards. The delivery is

made by driving the live stock from the pen where it has been already yarded, to another pen at the yards, which latter pen has been theretofore allotted by the yards to the trader or dealer for the purpose of yarding the live stock which the trader or dealer purchases from time to time. No transportation of any kind, directly or indirectly, either interstate or intrastate, is involved in the purchase or sale by the traders or dealers, of the live stock they handle.

The decision of the District Court rests squarely upon its proposition that the stock yards is an instrumentality of interstate commerce. *Ergo*, everyone doing business at the stock yards is engaged in interstate commerce. (Rec., 21-22.) Upon that reasoning the decision of the lower court must rest, otherwise it falls. If this reasoning be true, then the waiter at the hotel owned by and conducted at the stockyards, the cook, the bootblack who shines the shoes of the dealer and others who do business at the yards, the barber who shaves them, the workmen who clean the pens, the men who sell the food that is served at the Stock Yards Hotel, or who sell the grain that is fed to the live stock, etc., *ad finitum*, would be engaged in interstate commerce and therefore subject to congressional regulation and control.

As was said in *Pennsylvania R. R. Co.* v. *Knight*, 192 U. S. at p. 28:

> "As shown in the opinion from which we have just quoted, many things have more or less close relation to interstate commerce, which are not properly to be regarded as a part of it. If the cab which carries the passengers from the hotel to the ferry landing is engaged in interstate transportation, why is not the porter who carries the traveler's trunk from his room to the carriage also so engaged? If the cab service is interstate transportation, are the drivers of the cabs and the dealers who supply

hay and grain for the horses also engaged in interstate commerce? And where will the limit be placed?" (See, also, the numerous examples cited in the opinion by Mr. Justice Peckham, on pp. 592-594, in *Hopkins* v. *U. S.* 171 U. S.)

We do not believe that the distinction between interstate and intrastate commerce is controlled by any such rule or theory as that announced by the District Court.

As late as April 19, 1920, this court in *Blumenstock* v. *Curtis Pub. Co.* 252 U. S. 436 (opinion by Mr. Justice Day) said (p. 443):

> "We held in *Hopkins* v. *U. S.* 171 U. S. 579, that the buying and selling of live stock in the stockyards of a city, by members of the stock exchange, was not interstate commerce although the most of the live stock was sent from other states."

In *Hammer* v. *Dagenhart,* 247 U. S. 251, this court (opinion by Mr. Justice Day) said (p. 272):

> "When offered for shipment and before transportation begins, the labor of their (minors') production is over and the mere fact that they were intended for interstate commerce transportation does not make their production subject to Federal control under the Commerce power. * * * Nor does the fact that these things are to be afterwards shipped or used in interstate commerce make their production a part thereof. * * * When the commerce begins is determined, not by the character of the commodity nor by the intention of the owner to transfer it to another state for sale nor by his preparation of it for transportation, but by its actual delivery to a common carrier for transportation or the actual commencement of its transfer to another state."

In one of the earlier and leading cases in this court, *Coe* v. *Errol,* 116 U. S. 517, it was held, to epitomize the ruling as stated in the syllabus:

> "Goods, the product of a state, intended for exportation to another state, are liable to taxation as

> part of the general mass of property of the state of their origin, until actually started in course of transportation to the state of their destination, or delivered to a common carrier for that purpose; the carrying of them to, and depositing them at a depot for the purpose of transportation is no part of that transportation."

The court held, at p. 526:

> "Though intended for exportation, they may never be exported; the owner has a perfect right to change his mind; and until actually put in motion, for some place out of the state, or committed to the custody of a carrier for transportation to such place, why may they not be regarded as still remaining a part of the general mass of property in the state?"

In *State of New York ex rel. Pennsylvania R. R. Co.* v. *Knight,* 192 U. S. 21, *supra,* it was held that the cab service maintained by the Pennsylvania R. R. Co. to take passengers to and from its terminus in the City of New York, is not interstate commerce, although persons using the cabs within the company's regulations, either go to or come from the State of New Jersey by the company's ferry. This court quoted thus approvingly from *The Daniel Ball,* 10 Wall. 557, 565:

> " 'Whenever a commodity has begun to move as an article of trade from one state to another, commerce in that commodity between the states has commenced.' But this movement does not begin until the articles have been shipped or started for transportation from the one state to the other. The carrying of them in carts or other vehicles, or even floating them, to the depot where the journey is to commence is no part of that journey. That is all preliminary work, performed for the purpose of putting the property in a state of preparation and readiness for transportation. Until actually launched on its way to another state its destination is not fixed and certain. It may be sold or otherwise disposed of within the state, and never put in course of transportation out of the state."

In the recent decision rendered November 1, 1921, by the U. S. Circuit Court of Appeals, 4th Circuit, in *Winstow* v. *Federal Trade Commission* (not yet reported), the petitioners were shipchandlers who had their principal place of business in Norfolk, Va. There they kept in stock and sold to ships coming to that port supplies of various kinds. Ninety per cent of their business was done with English ships. Deliveries were made by launches from the warehouses to ships lying at anchor in Hampton Roads. When the transaction with a given ship had been completed by delivery of the supplies on board and the receipt of payment therefor, the petitioners gave the captain a gratuity or commission on the purchase price. It was this payment or gratuity or commission to the captains purchasing supplies for their ships, which the Federal Trade Commission held to be unfair competition. The controlling question was whether the petitioners were engaged in interstate or foreign commerce. Said the court:

> "This is the fundamental question to be determined, since if they were not the Commission was without jurisdiction. The claim that they were engaged in interstate commerce rests wholly on the fact that the commodities in which they deal are in large part transported into Virginia from other states in which they are procured. But this transportation ends when the goods reach their destination and are placed in petitioners' warehouses in Norfolk and Newport News. They are then incorporated in the general stock of merchandise there held for sale, and become subject, so far as now concerns us, to the exclusive jurisdiction of the State of Virginia. Their subsequent sale and delivery within that state, with which alone the condemned practices are connected, is in no sense interstate commerce. In short it is quite beyond doubt that the jurisdiction of the Commission over the matter in hand cannot be supported by the prior but independent and completed transportation of the goods,

> or some part of them, from another state. (Citing *Brown* v. *Houston*, 114 U. S. 622; *Robbins* v. *Taxing District*, 120 U. S. 489, 497; *Wagner* v. *Covington*, 251 U. S. 95, and other cases.)"

In *Arkadelphia Co.* v. *St. Louis, etc. Rd. Co.* 249 U. S. 134 (opinion by Mr. Justice Pitney), this court had before it the question whether a movement of rough lumber from woods to milling points in the same state, where the lumber remained for some time in process of manufacture before being sold and shipped as finished product to purchasers at destinations outside the state was interstate commerce. This court said (p. 151):

> "The raw material came to rest at the mill and after the product was manufactured it remained stored there for an indefinite period. * * * Where it would eventually be sold no one knew. And the fact that previous experience indicated that 95 per cent of it must be marketed outside the state so that this entered into the purpose of the parties when shipping the rough material to the mill did not alter the character of the latter movement,"

and make it interstate in character.

In *Browning* v. *Waycross*, 233 U. S. 16 (opinion by Mr. Chief Justice White), this court in holding that attaching to buildings lightning rods which had been shipped in interstate commerce was not in itself interstate commerce, said (p. 22):

> "Such business was wholly separate from interstate commerce, involved no question of the delivery of property shipped in interstate commerce, or of the right to complete an interstate commerce transaction, but concerned merely the doing of a local act after interstate commerce had completely terminated."

We feel that the motion to advance should be granted because of the public importance of the question involved, the magnitude of the interests concerned, the startling character of the decision of the